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IN THE

# Supreme Court of the United States

OCTOBER TERM—1954

## No. 343

THE AMERICAN FEDERATION OF MUSICIANS, a Voluntary Organization, JAMES C. PETRILLO, individually and as President of The American Federation of Musicians, and GEORGE COOPER, individually and as Representative of The American Federation of Musicians, Local Union Number 257 with offices in Nashville, Tennessee,

*Petitioners,*

*v.*

ABE STEIN, a Resident of Davidson County, Tennessee,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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# Supreme Court of the United States

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**No.**

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THE AMERICAN FEDERATION OF MUSICIANS, a Voluntary Organization, JAMES C. PETRILLO, individually and as President of The American Federation of Musicians, and GEORGE COOPER, individually and as Representative of The American Federation of Musicians, Local Union Number 257 with offices in Nashville, Tennessee,

*Petitioners,*

*v.*

ABE STEIN, a Resident of Davidson County, Tennessee,

*Respondent.*

---

*To: The Honorable The Chief Justice of The United States and The Associate Justices of The Supreme Court of the United States:*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Sixth Circuit, entered June 16, 1954, affirming the judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, issuing an interlocutory injunction against petitioners' continued listing of respondent in their publication as "unfair". The opinion

of the United States Court of Appeals for the Sixth Circuit (84-98* and Appendix B hereof) is reported at 213 F. 2d 679. There was no opinion in the District Court.

## Jurisdiction

The judgment (82, App. B, p. 51) sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit dated and entered on June 16, 1954. Jurisdiction of this Court is founded upon 28 U. S. C. § 1254 (1).

## Questions Presented

1. In a diversity suit in a United States District Court, does the court have jurisdiction over the civil action when a defendant, whether sued as an individual or as representative of an unincorporated association, is a citizen of the same state as the plaintiff?

2. May a United States District Court issue a temporary injunction against an individual defendant or an unincorporated association not served with process?

3. May a United States Court of Appeals refuse to pass on questions of jurisdiction raised on appeal from an order of a District Court granting a temporary injunction, although

(a) Two of the three defendants against whom the injunction purports to run were never served with process;

(b) The District Court held a hearing specifically on the issue of jurisdiction;

(c) More than one year after the granting of the temporary injunction and the immediate filing of a mo-

* Numerals in parentheses refer to continuous pagination in ink in the certified transcript of the record.

tion to vacate it in the District Court before the appeal, the District Court has not set the motion for hearing and has indicated no intention to do so;

(d) The Court of Appeals wrongly assumed that the District Court intended to "examine the jurisdictional questions" prior to trial.

4. Is the Norris-La Guardia Act (29 U. S. C. § 101 *et seq.*) inapplicable to a labor dispute if it involves personal services and interstate commerce?

5. Does the Norris-La Guardia Act apply to an action to enjoin a labor union from placing an entrepreneur's name on an unfair list for withdrawing from an arbitration proceeding begun by the entrepreneur against a member of that union before a board of that union prior to the rendition of an award and commencing a court action on the same claim?

## Statutes Involved

The questions presented herein raise issues under 28 U. S. C. §§ 1292(1), and 1332 and 29 U. S. C. §§ 101-115, the texts of which appear in Appendix A.

## Statement of the Case

This petition raises such questions about the administration of justice in the Sixth Circuit, and particularly in the Middle District of Tennessee, that this Court might well doubt that events happened as this statement says, if those events were not preserved in the astonishing record. The violation of fundamental precepts of law with respect to service of process and jurisdiction are so clear that this Court in its supervisory role for the federal courts can only reverse the judgment below.

This action, purporting to found jurisdiction on diversity (35-6), was brought in the United States District Court for the Middle District of Tennessee, Nashville Division, by Abe Stein, a citizen of the State of Tennessee (35), against three defendants; first, The American Federation of Musicians, alleged to be a New York corporation (35-6), but actually non-existent (63); second, James C. Petrillo, a citizen of the State of Illinois (36);* and third, George Cooper, a citizen of the State of Tennessee (36).**

The complaint alleged that the plaintiff is engaged in the business of "booking and promoting" bands, "principally orchestras of national prominence" (36). Plaintiff says that he contracted for the appearance and performance of Duke Ellington and his band and that Ellington did not appear for one performance. He submitted his claim for damages to arbitration by the Board of the American Federation of Musicians (37). After the submission of the dispute but before decision, plaintiff brought suit against Ellington on the same claim. Because he brought the court action instead of awaiting the award of the arbitration board, plaintiff's name was placed on the "unfair list" in the International Musician, the Federation's magazine (37-8; 68-70). Plaintiff's complaint was filed on July 31, 1953, alleging the above facts, claiming that he would suffer irreparable damage if the court did not enjoin the continued listing of his name as "unfair", and asking damages.

Only one defendant, George Cooper, was served with a copy of the summons and complaint (32). No service was made on James Petrillo (32). No service was or could be made on "The American Federation of Musicians, a New

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* Listed in the caption only as President of The American Federation of Musicians (31), but named only as an individual defendant in the body of the complaint (36).

** Listed in the caption only "as representative of The American Federation of Musicians, Local Union Number 257" (31), but named only as an individual defendant in the body of the complaint (36). "American Federation of Musicians, Local Union Number 257" is not identified in the complaint.

York Corporation" since the corporation of that name was no longer in existence (63).

Undeterred by the lack of service, plaintiff then filed a motion for a *permanent* injunction returnable on the morning of August 5, 1953 (40-1). He mailed a copy to James Petrillo which was received at his office during the afternoon of August 3, 1953 (42).* Defendant Cooper heard about the motion accidentally when, on its return date, plaintiff's attorney telephoned Cooper's attorney, Mr. Stokes, to ask if he was going to court (65).

Mr. Cooper's attorney did go to court to tell the District Judge that he represented the local union of which defendant Cooper was president, and that he did not represent the American Federation of Musicians named in the complaint, nor James Petrillo (65). Mr. Stokes, for his client, contested the jurisdiction of the court on the ground that there was not complete diversity of citizenship (65). The District Judge nevertheless ordered that a temporary injunction issue "as prayed" [sic] (48) saying:

> "Well, the plaintiff is the one that is the most interested in the matter. Of course, if you don't have jurisdiction of the defendant and I give you an injunction it won't do any good. If this Court doesn't have jurisdiction, you can't enforce it. So if I give you a void injunction, don't blame me with it, now" (48).

Before any injunction was signed, at Mr. Stokes' request the District Court directed that another hearing be held on August 7, 1953 on the issue of jurisdiction (66). Mr. Stokes appeared for the local union, and, this time, specially for the American Federation of Musicians, an unincorporated association (hereinafter called the "Federation"). Testimony on the issue of jurisdiction was taken.

* Mr. Petrillo was out of the country at the time and was not informed about the receipt of the copy of the notice of motion until the afternoon of the next day (42).

The court then permitted plaintiff to amend the complaint to add as a defendant, "The American Federation of Musicians, a voluntary organization", although no evidence was adduced that this association had any connection with the dissolved corporation which had borne that name (55). On the same day, the court signed an injunction against all the defendants (45). It gave no explanation of how an injunction could issue against James Petrillo, but as to the Federation (the association, not the corporation) the court said:

> ". . . it will not be necessary for process to issue against said organization in view of the fact that Honorable Jordan Stokes, III, Attorney, has entered an appearance in this cause for said defendant" (45).

Mr. Stokes, when he received a copy of the order, called to the District Judge's attention the fact that he had entered only a special appearance for the Federation. The injunction order was thereupon amended by the court to read:

> "for the purpose of hearing the motion for the issuance of a temporary injunction, it will not be necessary for process to issue against said organization, in view of the fact that Honorable Jordan Stokes III, Attorney, has entered a special appearance in this cause for said defendant for that purpose" (47).

Thus the amended order explains properly that the Federation appeared specially only for the hearing, and no explanation is given as to how a defendant not served with process may be enjoined. The injunction restrains the defendants from placing plaintiff's name on the unfair list, directs the removal of his name from that list, and further restrains defendants from taking any action which would prevent the plaintiff from securing the services of Federation members (45-7).

On August 26, 1954, the defendants Federation and Petrillo, still appearing specially to contest jurisdiction,

filed in the District Court and served a motion to vacate the injunction. The motion was returnable September 1, 1954 upon adequate notice. The District Judge, on the return date, was on vacation and did not hear the motion on that date, nor did the court indicate when the motion would be heard. On September 1, therefore, since the time for appeal was running out, defendants applied to Chief Judge CHARLES C. SIMONS of the United States Court of Appeals for the Sixth Circuit to assign another district judge, pursuant to 28 U. S. C. § 292, to the Middle District of Tennessee, Nashville Division, or to authorize the defendants to go before the district judge in another division of the same district (5). That application was denied. Defendants therefore filed their notice of appeal immediately prior to the expiration of their time to appeal from the injunction order.

On November 2, 1954, defendants again applied to the District Judge requesting that the motion to vacate the injunction be set for hearing (20). The District Judge's reply was that he would be very busy with trials at least until February, 1954, and did not know when he could hear the motion (21). To this date that motion has not been heard or set for hearing.

The appeal was argued on April 20, 1954. In the brief and upon oral argument defendants urged that the District Court lacked jurisdiction over the subject matter of the action, and over defendants Petrillo and the Federation for lack of service.

The Court of Appeals handed down its decision on June 16, 1954, less than two months short of a year after the temporary injunction issued. The gist of the opinion was that the questions raised were very serious—indeed, grave and difficult—and, for that reason, the District Court was justified in issuing a temporary injunction until it could hear and determine those questions.

The petitioners, therefore, have purportedly been under restraint by an order of a District Court for more than a year, although they contend that the Court had no jurisdiction to issue an injunction. The District Judge, moreover, had already held a hearing on the issue of jurisdiction before granting the injunction, although he made no findings on the issues. The Court of Appeals, while recognizing the serious questions of jurisdiction in the case (although it wrongly said that no questions of service were raised on the appeal) refused to pass on them, deferring to the supposed desire of the District Court to consider and decide those questions. The District Court, however, has managed to control that desire for more than a year*; indeed, it is perfectly clear that the District Court has seen no need for any additional hearing.

The papers on the motion to vacate which were before the court below on the appeal showed, *inter alia*, the following facts:

The Federation was formed as an unincorporated association prior to 1900 (63). In 1906, the State of New York issued a corporate charter to a membership corporation bearing the name, American Federation of Musicians (63). That corporation never functioned as a trade union and, so far as is known, never functioned at all (63). It was dissolved on October 15, 1952 for failure to file a report required by a statute enacted shortly prior thereto (63).

The Federation has 1600 members who are citizens of the State of Tennessee (61). Duke Ellington, a Federation

* The Court of Appeals implies that the motion to vacate was not heard because the notice of appeal had been filed on the injunctive order. 213 F. 2d, at p. 682. This is incorrect. The return date on the motion to vacate was September 1, 1953. The filing of the notice of appeal was effective September 8, 1953 when the bond was filed (34). On November 3, 1953, the District Judge wrote that he could not hear the motion because he would be busy trying cases each day until February 1, 1954 (21). No mention was made of the appeal from the injunctive order. The court, to this date, has still found no time to set a hearing date.

member, and member of its affiliated local in New York City, entered into an employment agreement with the plaintiff to which the Federation was not a party (69-70, 71-5). The contract blank, however, was one issued by the Federation (71), and it incorporated therein the Federation's by-laws (73-4). Section 7 of Article 9 of those by-laws (8, p. 63) contains an arbitration clause which provides that disputes involving travelling bands shall be arbitrated before the Federation's International Executive Board.

Since Mr. Ellington's group was a travelling band (70), the respondent submitted his dispute to that Board in New York (70). Submission of the evidence was completed in October, 1951 and the complete record was submitted to the Board for decision on October 24, 1951 (70). Prior to November 9, 1951, however, respondent commenced an action in court against Ellington on the same claim he had submitted to arbitration (70). Because of his failure to await the award before proceeding further, respondent's name was placed on the Federation's unfair list on November 9, 1951 (70).

## Reasons for Allowance of the Writ

### I

**A United States District Court has no jurisdiction in a diversity action in which a defendant is a citizen of the same state as the plaintiff, whether he is sued as an individual or as a representative of an unincorporated association.**

Mr. George Cooper, the only defendant served with process in this action, was named as an individual defendant in the body of the complaint (36), although, in the caption, he is listed "as representative of The American Federation of Musicians, Local Number 257 with offices in

Nashville, Tennessee" (31). Local Union No. 257, AFM, is another name for the Nashville Association of Musicians, a voluntary unincorporated association, almost all of whose members are citizens of the State of Tennessee (9, 43, 54 and see pp. 37-54 of exh. at 9).

If Mr. Cooper is an individual defendant, then, as to him, the suit is between two individuals who are citizens of the same state. Patently, no diversity exists here.

If Mr. Cooper is sued as representative of the Nashville Association of Musicians (AFM Local 257), still, no diversity exists. This is so, because, in a representative action, diversity exists only if the representative members, who are parties to the civil action, are all citizens of States other than the State of which any of the adverse parties to the action are citizens. *Rosendale* v. *Phillips,* 2 Cir. 87 F. 2d 454; see also *Supreme Tribe of Ben Hur* v. *Cauble,* 255 U. S. 356; *Philadelphia Local 192* v. *American Federation of Teachers,* 44 F. Supp. 345. To maintain jurisdiction against the Nashville Association, sued through Cooper, would be in conflict with the decision of the Court.

The lack of jurisdiction over the action against Cooper, in any capacity, is so clear that this Court should reverse the judgment below as to him without even hearing argument. And, it is equally clear that, there being no diversity as to one defendant, the district court lacked jurisdiction over the action against the remaining defendants as well.

> "When federal jurisdiction is grounded on diverse citizenship, it must affirmatively appear in the pleading or from facts clearly proven that diversity of citizenship exists between all the plaintiffs on the one hand and all of the defendants on the other. *Strawbridge* v. *Curtiss,* 3 Cranch 267 . . .; *Thomas* v. *Board of Trustees,* 195 U. S. 207 . . ." *Levering & Garrigues Co.* v. *Morrin,* 2d Cir., 61 F. 2d 115, 117.

Since the plaintiff brought his action originally in the district court and named Cooper as one of the defendants, he

thereby precluded the court from acquiring any jurisdiction over that action. *Olsen* v. *Jacklowitz,* 2d Cir., 74 F. 2d 718; *Schuckman* v. *Rubenstein,* 6th Cir., 164 F. 2d 952, 956, *cert. den.,* 333 U. S. 875.

## II

**A United States District Court may not issue a temporary injunction against an individual or an unincorporated association not served with process.**

One of the defendants named by plaintiff is James C. Petrillo, an individual who has not been served with process (42). He has appeared specially for the sole purpose of contesting the court's jurisdiction.*

The complaint seeks an injunction against "the defendants" (39-40) and the motion, pursuant to which the temporary injunction was granted, merely requests "a permanent injunction as prayed for in the above entitled cause" (40-41). The district court granted an injunction against all defendants, including those not served.

The Court of Appeals stated in its opinion that "no question of service is raised on this appeal." 213 F. 2d 681. This is simply wrong. Defendants' brief raised the issue here presented, and the decision below itself notes at least one other issue of service raised below. 213 F. 2d, at page 689.

In sustaining the injunction issued against Mr. Petrillo, the decision below is squarely in conflict with the holding in *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229. There, an international union and its officers were named as defendants but some of the officers were not served. This Court declared that:

* The filing of Mr. Petrillo's affidavit in support of the Federation's contest of jurisdiction (42, 66) did not, of course, subject him to the court's jurisdiction as a party. *Schuckman* v. *Rubenstein,* 6th Cir., 164 F. 2d 952, 956, *cert. den.,* 333 U. S. 875.

> "The final decree of the district court included an award of injunction against John Mitchell, W. B. Wilson, and Thomas Hughes, who, while named as defendants in the bill, were not served with process and entered no appearance except to object to the jurisdiction of the court over them. Under the Federal practice, the appearance to object did not bind these parties to submit to the jurisdiction on the overruling of the objection [citing cases], and since the injunction operates only in personam, it was erroneous to include them as defendants." 245 U. S. at 234.

The same principles apply to the injunction issued against the Federation which was not served with process. Originally, the Federation was not named as a party. Instead, plaintiff had named a dissolved New York corporation, not in any way connected with the Federation, but bearing the name, American Federation of Musicians, as defendant. The District Court ordered that the Federation be added as defendant as "successor to this corporation", without any proof having been adduced of any connection between the two (55).

The injunction order, however, while reciting that the Federation had been added as a party as "successor", asserts that service of process was unnecessary because of the appearance of counsel for the Federation (45). Upon protest that no general appearance had been made, the court amended the order to recite a special appearance for the purpose of the hearing (47). This special appearance which had been for the very purpose of challenging jurisdiction on several grounds including lack of service was treated as a substitute for service of process. This is precisely what *Hitchman Coal & Coke Co.* v. *Mitchell, supra,* 245 U. S. at 234, holds may not be done.*

Again, the lack of jurisdiction as to defendants Petrillo and the Federation are incontestable on the record. The

* Nor can service upon Cooper, the only defendant served, be construed, by any interpretation of the facts (see 15-16), as service on the Federation, for at the time he was served, the Federation (the association) was not named as a party.

judgment below should be reversed as to these defendants for lack of service, without calling for oral argument.

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If for any reason not apparent to petitioners, this Court should believe that the matters stated in Points I and II do not demand reversal without argument, petitioners urge that the remaining points raise meritorious grounds for reviewing the judgment below on certiorari.

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## III

**A United States Court of Appeals must pass upon the jurisdiction of the District Court upon an appeal from a temporary injunction.**

In the District Court, petitioners raised only jurisdictional issues. Hearings were held on August 5, 1953 and on August 7, 1953 (48).*

In the Court of Appeals, also, defendants raised the jurisdictional issues. That court said that the "questions going to the jurisdiction of the district court to entertain the case were grave and difficult." 213 F. 2d, at p. 689. Yet, it sustained the issuance of the temporary injunction without passing upon these jurisdictional issues squarely raised by defendants.

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* The hearing of August 7th was not an adjourned hearing from that of August 5th, as stated by the Court of Appeals, but was ordered after the close of the August 5th hearing (66) and after the court decided to issue the injunction (48). It was ordered, upon defendants' request, solely to hear the jurisdictional issue (66). Defendant Federation appeared specially to contest jurisdiction in that hearing (49, 66).

The Court of Appeals stated that "As far as the record discloses, no arguments were advanced and no legal authorities cited by defendants." 213 F. 2d, at p. 682.

The order of the District Court, however, recites that there was "statement and argument of counsel for both plaintiff and defendants" (45) and those parts of the record which were printed (48, 49, 55) make it clear that there was argument which was not printed.

The theory of the Court of Appeals was that the temporary injunction was in the nature of a temporary stay, and that the jurisdictional issues should be raised by a motion to vacate. 213 F. 2d, at p. 682. At the outset, this theory fails to square with the facts.*

Plaintiff moved for a "permanent injunction" (40-1). When the court was informed that defendants wished to raise jurisdictional issues, a hearing was held solely on those issues (66-7). When the court finally directed that the injunction issue, it contemplated no further action until the trial. No further hearing was set or suggested. Nor did the Court believe that it was preserving its jurisdiction until it had the opportunity to consider the serious issues.** The failure by the District Court to find time to hear the motion to vacate, predicated solely upon jurisdictional grounds, in more than one year since the motion was returnable demonstrates beyond any possibility of doubt that it had not issued the temporary injunction for any short period pending opportunity to hold a hearing on jurisdictional issues.

We submit that the Court of Appeals erroneously failed to pass upon the jurisdictional issues raised on the appeal. In *United States* v. *United Mine Workers of America,* 330 U. S. 258, the District Court issued a temporary restraining order for ten days and, at the same time, set a hearing date for determining jurisdictional issues

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* The District Judge stated "Let the injunction be granted and this will require going into several issues of fact relative to the jurisdiction" (55) (213 F. 2d 678). The Court of Appeals appears to interpret the remark to mean that jurisdiction would be inquired into in the future.

The remainder of the District Judge's statement, however, was "The defendant in this case will have the right to rely upon the same defenses raised at this time upon the hearing of the cause" (55). Obviously, he was referring to the trial of the action, and the fact that no hearing has been set on the jurisdictional questions although a motion to vacate was filed and made returnable more than a year ago confirms this conclusion.

** The District Judge's remarks (55) may perhaps be interpreted as a direction to plaintiff's counsel to prepare findings on the jurisdictional issues, but the court's order contains no findings on these matters, with the exception of the curious statement about the lack of service of process upon the Federation. At any rate, after holding a hearing on the jurisdictional issues, the Judge issued the injunction.

(330 U. S., at pp. 265-7) in pronounced contrast to what occurred here. Yet, in that case, this Court declared that, if the district court lacked jurisdiction, it would set aside the preliminary injunction even though defendants could be punished for violating it while it was in effect. 330 U. S. 295. Here, the Court of Appeals refused even to pass upon the jurisdictional issues raised.

The cases cited by the Court of Appeals (213 F. 2d, at pp. 682-3) relating to the issuance of temporary injunctions pending an opportunity for a full hearing are entirely distinguishable, but for one, on the ground that they dealt, not with jurisdiction, but with weighing the equities of the merits between the parties, on request for preliminary injunction. The one exception is *United States* v. *Brotherhood of Locomotive F. & E.*, 104 F. Supp. 741, where the district court, following the *United Mine Workers* case, *supra,* directed "a prompt and complete hearing." 104 F. Supp., at p. 744. That decision, however, does not hold that, if jurisdiction is in fact absent, a Court of Appeals will not review the order and reverse it.

Even if the order must be obeyed until reversed, still a Court of Appeals may not refuse to pass upon the jurisdictional issues. As this Court declared in *Mitchell* v. *Maurer,* 293 U. S. 237, 244:

> "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."

"[T]he question of [jurisdiction's] existence must be noticed by the court at any stage of the case." *Scroggin Farms Corp.* v. *McFaddin,* 8th Cir., 165 F. 2d 10 at 15.

Even with respect to the violation of an injunctive order before it is reversed, this court declared in the *United Mine Workers* case, *supra,* that the jurisdictional issues must be substantial to warrant the imposition of any penalty. The effect of that decision is that if no sub-

stantial grounds exist to support the contention that there is jurisdiction, the court lacks power to issue an injunctive order even pending a hearing.

In the *Mine Workers* case, this court stressed the facts that the jurisdictional issue "depended upon a statute, the scope and applicability of which were subject to substantial doubt" (330 U. S., at p. 294). "The applicability of the Norris-LaGuardia Act to the United States in a case such as this had not previously received judicial consideration, and both the language of the Act and its legislative history indicated the substantial nature of the problem with which the District Court was faced" (330 U. S., at p. 293). Finally, this Court declared that "a different result would follow were the question of jurisdiction frivolous and not substantial" (330 U. S., at p. 293).

Surely, any claim of diversity is frivolous in the light of the same citizenship of Cooper and Stein. Nor can any serious claim be made that jurisdiction existed over Petrillo or the Federation, neither of whom had been served with process. The Court of Appeals did not even discuss these issues which had been raised both in the District Court and upon the appeal. And on these issues alone, the judgment should have been reversed.

The Court of Appeals devoted most of its opinion to discussion, not decision, of whether an unincorporated association has a citizenship of its own, apart from its members, for diversity purposes. Even this is not a novel question, however. It has been passed upon many times with but a single answer.

This Court has held that a joint stock association does not have a separate citizenship of its own, but has the citizenship of its members. *Chapman* v. *Barney,* 129 U. S. 678. See also *Taylor* v. *Weir,* 3d Cir., 171 Fed. 636. The decisions of the courts of appeals and the district courts other than in the instant decision are unanimous in holding that the citizenship of an unincorporated association

is that of its members, and that diversity does not exist if any members are citizens of the same State as is any adverse party to the civil action. *Rosendale* v. *Phillips,* 2d Cir., 87 F. 2d 454; *Levering & Garrigues Co.* v. *Morrin,* 2d Cir., 61 F. 2d 115; *Ex Parte Edelstein,* 2 Cir., 30 F. 2d 636, *cert. den.* 278 U. S. 851; *Wise* v. *Brotherhood of Locomotive F. & E.,* 8th Cir., 252 Fed. 961, 965; *James* v. *International Brotherhood of Boiler Makers, etc.,* 54 F. Supp. 94; *Sun Shipbuilding & Dry Dock Co.* v. *Industrial Union,* 95 F. Sup. 50, 52; *Murphy* v. *Hotel & Restaurant Employees, etc.,* 102 F. Supp. 488; *Stein* v. *Brotherhood of Painters, etc.,* 11 F. R. D. 153, 154; *Pennsylvania Greyhound Lines* v. *Amalgamated Ass'n.,* 105 F. Supp. 537; *Williams* v. *United Brotherhood of Carpenters,* 81 F. Supp. 150; *Russell* v. *Central Labor Union,* 1 F. 2d 412; *International Allied P. T. Ass'n* v. *Master P. Union,* 34 F. Supp. 178; *Green* v. *Gravatt,* 34 F. Supp. 832; see *Philadelphia Local 192, etc.* v. *American Federation of Teachers,* 44 F. Supp. 345 at 346-7.

The Court of Appeals stated in its opinion that *Van Sant* v. *American Express Co.,* 3d Cir., 169 F. 2d 355, held that a New York joint stock association was a citizen of New York for diversity purposes. That case, however, held only that a joint stock association had the capacity to be sued in its common name. It specifically held that the rule of *Chapman* v. *Barney, supra,* was not involved there, and the footnote reference quoted by the opinion below was *obiter dictum.*

The only other opinion relied upon by the Court of Appeals was a dissent by Judge MANTON to a decision joined in by Judges LEARNED HAND and AUGUSTUS N. HAND in the *Edelstein* case, *supra;* and a decision of this Court holding that a sociedad en comandida was a citizen of Puerto Rico because, under the civil law, it was a juridical person. *People of Puerto Rico* v. *Russell & Co.,* 288 U. S. 476. These decisions do not raise a substantial doubt such as would warrant the issuance of a restraining order for

the purpose of considering jurisdiction, let alone a temporary injunction which made no provision for a hearing on the jurisdictional issue. And even if they did, the absence of diversity as to Cooper and lack of service of process were enough to preclude jurisdiction.

The decision below is in conflict with the principles declared in the decisions of this Court and in other circuits, that the issue of jurisdiction must be passed upon in appeals from lower federal courts. Moreover, to uphold a temporary injunction where jurisdiction is not found to exist upon the theory that its purpose is to afford a hearing on jurisdictional issues when the issuing court did not so regard it and for over a year has declined to afford just such a hearing, is to depart so far from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

## IV

**The Norris-La Guardia Act is not rendered inapplicable to a labor dispute if personal services and interstate commerce are involved.**

The Court of Appeals held that the Norris-La Guardia Act did not apply here. Because its reasoning is difficult to follow, we set forth the Court's own language in its entirety:

> "The Norris-La Guardia Act curtailed the equity jurisdiction of federal courts in the field of labor disputes. Where the equity jurisdiction of the court is founded upon interstate and foreign commerce, it would seem that, in any event, the booking of an orchestra was not within the provisions of the Act. Contracts negotiated for vaudeville entertainment are for personal services and are not a subject of commerce under the Sherman Anti-Trust Act. *Hart* v. *B. F. Keith Vaudeville Exchange,* 12 F. 2d 341 (C. C. A. 2); see also *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271. Contracts with baseball players are, likewise, for personal services and are

> not a subject of trade or commerce. *Federal Baseball Club* v. *National League,* 259 U. S. 200; *Toolson* v. *New York Yankees,* 346 U. S. 356. See also Title 12 U. S. C. A., Section 15, for definition of 'commerce' in Sherman Anti-Trust Act, and Title 29 U. S. C. A., Section 152, for definitions of 'commerce' and 'affecting commerce' in Labor-Management Relations Act. If the contract negotiated for the playing of an orchestra is for personal services, it would not come within the provisions of the Norris-La Guardia Act, relating to labor disputes of which federal courts have jurisdiction under the commerce clause." (213 F. 2d, at p. 684, n. 2.)

The Court appears to be saying one of two things: (1) the Norris-La Guardia Act was predicated upon the commerce clause of the Constitution. Because the personal services here involved are not "commerce", the Act is inapplicable; or (2) the equity jurisdiction of the district court rested here upon the commerce clause of the Constitution. While the Norris-La Guardia Act sought to limit that jurisdiction, it applies only where "commerce", as used in the anti-trust statutes, exists. Since personal services do not constitute such "commerce", the Act is inapplicable.

Whatever interpretation be placed upon the court's reasoning, it cannot be correct. To say that Norris-La Guardia is limited to cases where "commerce" exists and that personal services are not commerce, means that the statute is inapplicable to any case.* Norris-La Guardia is entirely unconnected with the commerce clause; it was enacted in reliance upon Congressional power to regulate the jurisdiction of inferior federal courts and applies to cases sought

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*The court below cited cases which hold that, *under the Sherman Act,* contracts for personal services are not "commerce". If it were true, as the court seems to assume, that the Norris-La Guardia Act applies only to "commerce", its passage would not have accomplished one of its prime purposes, the removal of federal court intervention in local labor disputes. And if the definition of "commerce" as applied under the Sherman Act is transplanted to this strange version of the Norris-La Guardia Act, the Act becomes completely meaningless.

to be brought in those courts, regardless of the jurisdictional basis invoked. *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 330; *Levering & Garrigues Co.* v. *Morrin*, 71 F. 2d 284, 287, *cert. den.* 293 U. S. 595.

As to the suggestion which may be inherent in the words of the court quoted above that the jurisdiction here is based on interstate commerce, the services which were to have been performed for Stein by Ellington's band were not in interstate commerce. The rendition of musical services by an orchestra within a state is intrastate. At most, an interstate journey might have been required in order that the orchestra members might perform the intrastate services. Even that has not been shown.*

Even were interstate commerce affected, no attempt was made to invoke any jurisdiction of the district court based upon interstate or foreign commerce. Jurisdiction of the district court in this action was predicated solely upon diversity.

Finally, a holding by the court below that the Norris-La Guardia Act does not apply to cases involving personal services in interstate commerce would be in conflict with the decisions of this Court and of other circuits.

These decisions have applied that statute not only to employees whose work affected interstate commerce (*Milk Wagon Drivers Union* v. *Lake Valley F. Products*, 311 U. S. 91; *Donnelly Garment Co.* v. *Dubinsky*, 8th Cir., 154 F. 2d 38), but to employees directly engaged in interstate or foreign commerce such as truck drivers (*Anderson* v. *Bigelow*, 9th Cir., 130 F. 2d 460, 463, *cert. den.* 317 U. S. 690; *Colorado-Wyoming Express* v. *Denver Local Union*, D.

* While the record reveals that the contract was executed with parties from New York (37), there is no evidence as to where the band was employed at the time the contract was signed, or during the period prior to or after the employment dates set forth in the contract with plaintiff. There is, therefore, no evidence that interstate commerce was affected by the employment. Interstate commerce was neither pleaded nor proved with respect to the hiring of the Ellington band.

Colo., 35 F. Supp. 155; *Houston & North Texas M. F. Lines* v. *Local Union No. 886,* W. D. Okl., 24 F. Supp. 619), railroad employees (*Brotherhood of R. T.* v. *Toledo, Peoria & W. R.,* 321 U. S. 50), telegraph company employees (*Western Union Tel. Co.* v. *International Brotherhood,* 7th Cir., 135 F. 2d 955), and longshoremen in the port of New York (*Alcoa S.S. Co.* v. *McMahon,* 81 F. Supp. 541, aff'd 2d Cir., 173 F. 2d 567, *cert. den.* 338 U. S. 821).

## V

**The Norris-La Guardia Act applies to an action to enjoin an unfair listing by a labor union.**

The Court of Appeals held that no labor dispute existed because the dispute between the plaintiff "and the band leader was a plain case of breach of contract." 213 F. 2d, at p. 685. Since most labor relations are the subject of contract, and a good many disputes arise under such contracts, it is indeed strange for a court to say that a labor dispute does not exist *because* a contract was breached. Another circuit has held, moreover, that even an adjudication by a court that there has been a breach of contract does not remove the case from the category of "labor dispute". *Alcoa S.S. Co.* v. *McMahon,* 2d Cir., 173 F. 2d 567, *cert. den.* 338 U. S. 821.

The dispute between Stein and the Federation did not relate to whether or not Ellington was liable for his failure to appear for work as allegedly agreed. It related to Stein's withdrawing from an arbitration proceeding which he had himself instituted against a Federation member before a Federation board, and his suing in court on the same claim (37-8; 70-1).

On the facts alleged in the complaint, the parties to the dispute are an entrepreneur and a labor union having

interests in the same industry. The entrepreneur claimed that a member of the labor union had breached a contract with him. This claim was submitted to arbitration before a union board, but, before an award was rendered, the entrepreneur withdrew and sued in court on the same claim.

Certainly, the breach of an arbitration submission relates to working conditions and terms of employment. A study by the Bureau of Labor Statistics in 1952 revealed that 91% of the organized workers in the country were employed under contracts containing arbitration clauses. 76 Monthly Labor Review, 261, 262 (1953).

The Court of Appeals, however, stated that it did not take into account the fact that the contract beween Stein and the band required that the musicians render services as employees, because the contract was not before the District Court at the time the order issued, (213 F. 2d, at p. 685) although it was subsequently submitted on another motion and was in the record transmitted to the Court of Appeals (71-5).

One answer to the Court of Appeals' implied argument is that a labor dispute existed on the remaining facts alleged in the complaint without proof as to the relationship between Stein and the band. *Milk Wagon D. Union* v. *Lake Valley F. Products,* 311 U. S. 91, 98-9; *Hotel Stanley of Lakewood, Inc.* v. *Bright,* S. D. N. Y., March 4, 1954, 33 Bur. Nat. Aff. LRRM 2691 (not yet officially reported). *Cf. New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U. S. 552; *Levering & Garrigues Co.* v. *Morrin,* 2d Cir., 71 F. 2d 284, *cert. den.* 293 U. S. 595.

In any case, the burden lies upon the plaintiff affirmatively to prove jurisdiction which "must appear positively. It is not enough that it may be inferred argumentatively." *Continental Life Ins. Co.* v. *Rhoads,* 119 U. S. 237, 240. Moreover "the presumption at every stage of a cause is that the cause is outside the jurisdiction of a court of the

United States unless the contrary appears from the record." *United States* v. *Green*, 9th Cir., 107 F. 2d 19, 22; *Young* v. *Main*, 8th Cir., 72 F. 2d 640, 642; also *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 337.

The complaint alleges that the dispute involves an entrepreneur and a labor union having interests in the same industry or occupation; that the entrepreneur had a dispute with a member of that union relating to nonperformance of services which was submitted by the entrepreneur to arbitration before a board of that union, but before an award was rendered, the entrepreneur withdrew and sued in court. If we assume, *arguendo*, that an employer-employee relationship was required to constitute a "labor dispute", certainly the inference that it existed is raised by the facts pleaded. Moreover, since the jurisdiction of the court depended upon the absence of such a relationship, it was incumbent upon plaintiff to plead that absence. Yet, the complaint does not deny that an employer-employee relationship existed, nor allege that Ellington was an independent contractor. That plaintiff could not do, for the contract provided otherwise. He therefore attempted to conceal the relationship by the use of technical, trade terminology.

The allegations of the complaint, read in the context of trade practice, recite that plaintiff's relationship with the musicians was one of employment. Plaintiff used the trade terminology "book" and "promote" in describing his relation to the musicians (37). A promoter is a person in the entertainment business not having a fixed place of business (*e.g.*, a restaurant or night club), who hires a hall for a particular occasion. When it is said that a promoter "books" a band, that means he hires it. The terms used in the complaint therefore, far from stating that the musicians were not employees, imply that they were. The proper trade terminology where the musicians are not em-

ployed is to say that the entrepreneur "bought the band as a package."*

In addition, since the question of jurisdiction was appropriately raised, and jurisdiction cannot be conferred by consent, the Court of Appeals should have ascertained its presence or absence, *Mitchell* v. *Maurer*, 293 U. S. 237, 244, or required the District Court to do so. *McNutt* v. *General Motors Accept. Corp.*, 298 U. S. 178, 189; *KVOS* v. *Associated Press*, 299 U. S. 269, 278; *Thomson* v. *Gaskill*, 315 U. S. 442, 446.

Whatever ambiguity may have existed as to the relation between Stein and the musicians is resolved by the contract between them which was in the record before the Court of Appeals. It was clearly a contract between Stein as employer and 14 musicians as employees in which "the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians * * *" (71).

## Conclusion

The negative answer required on the record to the first two questions presented calls for a reversal of the judgment below without oral argument, because of the absence of jurisdiction over the action for lack of diversity and the absence of jurisdiction over two defendants for lack of service of process.

The third question presented is predicated upon so glaring an abuse of the administration of justice in the federal courts as to call for the exercise of this Court's power of supervision. A district court, patently without jurisdiction, has issued an injunction after holding a hearing on the issue of jurisdiction, and has declined for over a year to hear a motion to vacate founded upon the lack of jurisdiction. Yet, the Court of Appeals refused to pass

* The difference in contract between booking or promoting a band and buying a package is shown by the contracts appearing in the record respectively at 71-5 and 56-60.

upon the jurisdictional issues on the theory that the district court had merely issued the order pending consideration of the jurisdictional issues.

A novel and important question in the administration of the Norris-La Guardia Act is presented in the fourth question, for the holding below appears to render that Act inapplicable to any labor dispute involving interstate commerce.

The fifth question presented raises the issue whether breach of an arbitration submission may be the basis of a labor dispute. The decision below is in conflict with those of this Court and of other circuits on several issues, and the question is an important one in the administration of the Norris-La Guardia Act.

**The judgment below should be reversed without argument, or this petition should be granted.**

Respectfully submitted,

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## APPENDIX A

*United States Code, Title 28*

§ 1292. The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the District Courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

• • •

§ 1332. (a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States;

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States", as used in this section, includes the Territories and the District of Columbia.

NORRIS-LA GUARDIA ACT

*United States Code, Title 29*

§ 101. No court of the United States, as defined in sections 101-115 of this title, shall have jurisdiction to issue any restraining order or temporary or permanent injunc-

tion in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in such sections.

§ 104. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action, or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

§ 107. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 101-115 of this title, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be

rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complaint and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

§ 108. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

§ 109. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in sections 101-115 of this title.

§ 113. When used in sections 101-115 of this title, and for the purposes of such sections—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are

employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

## APPENDIX B

No. 12051

APPEAL from the District Court of the United States for the Middle District of Tennessee, Nashville Division.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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THE AMERICAN FEDERATION OF MUSICIANS, A New York Corporation, with its principal offices in New York, New York, and Chicago, Illinois; and JAMES C. PETRILLO, as President of The American Federation of Musicians; and GEORGE COOPER, as representative of The American Federation of Musicians, Local Union Number 257 with offices in Nashville, Tennessee, The American Federation of Musicians, a voluntary organization,

*Defendants-Appellants,*

*v.*

ABE STEIN, a resident of Davidson County, Tennessee,

*Plaintiff-Appellee.*

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Decided, June 16, 1954.

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BEFORE ALLEN and MCALLISTER, Circuit Judges, and STARR, District Judge.

MCALLISTER, Circuit Judge. This is an appeal from an order granting a preliminary injunction issued to prevent impending irreparable injury. Appellants contend that the district court was without jurisdiction to issue the preliminary injunction inasmuch as there was no diversity of citizenship; that the issuance of the temporary injunction was in violation of the Norris-LaGuardia

Act, since the relief was granted in a controversy that involved a labor dispute; and that the district court had no power to enjoin a labor union from placing the name of appellee, as an employer, on its unfair list, to publicize the existence of a labor dispute in violation of the First Amendment to the Constitution.

Appellee is a citizen of Tennessee and is engaged in the business of booking entertainment for public shows and exhibitions. In 1951, he entered into a contract with a band leader to play two performances in Memphis, Tennessee. The band failed to appear as scheduled, and thereafter, appellee was advised by the American Federation of Musicians, of which the band leader was a member, to submit his claim to the arbitration board of that union. Appellee did so, but claims that the matter was so long delayed without any action being taken, that when the same band leader came again to Tennessee, appellee sued him and, as a result, the band leader settled appellee's claim of damages by a money payment. Thereafter, the American Federation of Musicians placed appellee's name on its unfair list, and circulated this list in its official journal throughout the United States and Canada, in many issues of the magazine. It appears that for a time thereafter, appellee was not following his booking business, but that when he had an opportunity to reenter it, he found he was boycotted by musicians, as a result of the "unfair" listing. He, therefore, filed a complaint on July 30, 1953, in the District Court for the Middle District of Tennessee, claiming damages and asking for the issuance of an injunction to prevent the American Federation of Musicians from circulating his name in its unfair list. Among the allegations in his complaint, appellee set forth that his name was placed on the unfair list merely because he had sued the band leader and thus enforced his claim for damages; that the placing of appellee's name on the unfair list constituted an auto-

matic boycott of appellee by each and every member of the union; that, as a result, appellee had been totally and illegally prevented from pursuing his profession and denied the right to earn his livelihood in his accustomed and rightful manner; and that the listing of his name on the unfair list was libelous per se, and done with intent to injure and defame appellee and damage him in his business.

The parties named defendant in this suit, after amendments not here relevant, were the American Federation of Musicians, a voluntary organization with its principal offices in New York City; James C. Petrillo, as its President; and George Cooper, as the representative of the American Federation of Musicians, Local Union No. 257, with offices in Nashville, Tennessee. No question of service is raised on this appeal. A motion for injunction was filed by appellee, which was noticed for hearing for August 5, 1953, at Nashville, Tennessee; and on that day, the motion came on for hearing before the Honorable ELMER D. DAVIES, and was adjourned to August 7. Counsel appeared generally for defendant George Cooper, and for Local No. 257 of Nashville, and entered a special appearance for the American Federation of Musicians, a voluntary, unincorporated association, for the purpose of resisting the issuance of a temporary injunction, on jurisdictional grounds.

On the hearing, an affidavit of Mr. Petrillo, one of the defendants, was filed, setting forth that he had just returned from Europe on August 4, 1953; that he had been advised that a carbon copy of the notice of motion had been received in his office on August 3; that neither he nor anyone in his office had at that time received a copy of the complaint; that neither George Cooper nor Local 257 had ever been designated or authorized to act as an agent or representative of the American Federation of Musicians for any purpose whatever; and that the Ameri-

can Federation of Musicians was a labor organization, an unincorporated association, with executive offices in New York City and Newark, New Jersey, and that it did not do business in the State of Tennessee. An affidavit of Mr. Cooper was also filed; and Mr. Stein, the plaintiff, and Mr. Cooper, one of the defendants, were sworn as witnesses.

The evidence thus introduced pertained to the relationship as between the local union and the American Federation of Musicians, as well as to the relationship between defendant Cooper, the president of the local, and the Federation. It also disclosed the nature of the contractual relationship between third persons, who contract with members of the American Federation of Musicians; the obligations of such members to the Federation, and the rights of the local unions in such contracts. It also appears from the evidence that the contract entered into between appellee and traveling musical organizations was governed by bylaws, regulations, and resolutions of the American Federation of Musicians; that delegates of the local union participated in forming the rules and regulations under which the American Federation of Musicians operates; that the local union has a jurisdiction for which it is responsible in the State of Tennessee and in part of the State of Kentucky; and that it collects and forwards dues to the American Federation of Musicians.

After the presentation of the foregoing evidence, the district court entered an order setting forth that it appeared that unless a temporary injunction issued, the plaintiff would suffer irreparable damages, "inasmuch as his name will be carried on the 'unfair list' published monthly in defendants' official magazine, and which will prevent him from making contracts with musicians for the fall season, which will begin shortly." In deciding to issue the temporary injunction, the district court stated to counsel in open court: "Let the injunction be granted and this will require going into several issues of fact rela-

tive to the jurisdiction. The defendant in this case will have the right to rely upon the same defenses raised at this time upon the hearing of the cause." It does not appear that the allegations of the complaint were traversed or that any answers were filed or that any written objections were interposed to the motion for injunctive relief, either by the defendants appearing specially or generally. As far as the record discloses, no arguments were advanced and no legal authorities cited by the defendants. There appear to have been no briefs filed before the district court on matters of fact or of law. The preliminary injunction, in view of the remarks of the district court, could be said to partake of the nature of a temporary stay such as is subject to being vacated on motion at any time upon a showing of fact or law that its continuance is not justified. In fact, it appears that defendants-appellants did file a motion to dissolve the preliminary injunction on August 26, 1953, and noticed it for hearing on September 1, 1953. However, before the district court heard the motion to vacate, appellants filed their notice of appeal to this court.

We are of the opinion that the granting of the preliminary injunction should be sustained. In *Blount* v. *Societe Anonyme du Filtre Chamberland Systeme Pasteur et al.*, 53 F. 98, 101 (C. C. A. 6), a case heard before Judge JACKSON (later Justice JACKSON, of the Supreme Court) and Judge TAFT (later Chief Justice TAFT, of the Supreme Court), the court said: "The object and purpose of a preliminary injunction is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined upon strictly legal proofs, and according to the course and principles of courts of equity. . . . The legal discretion of the judge or court in acting upon applications for provisional injunctions is largely controlled by the consideration that the injury to the moving party, arising from a refusal of the writ, is certain and great, while the damage to the

party complained of, by the issuance of the injunction, is slight or inconsiderable."

In passing upon the issue then before the court, Judge JACKSON referred to what was said by Lord Cottenham in *Great Western R. Co.* v. *Birmingham & O. J. Ry. Co.*, 2 Phil. Ch. 602:

> "It is certain that the court will in many cases interfere and preserve property in statu quo during the pendency of a suit in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights. It is true that the court will not so interfere if it thinks that there is no real question between the parties; but, seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff;"

and in *Glascott* v. *Lang*, 3 Mylne & C. 455, it was stated by the same judge that—

> "In looking through the pleadings and evidence for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiffs to relief at all events. It is quite sufficient if the court finds, upon the pleadings and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

In his opinion in the *Blount* case, *supra*, Judge JACKSON also referred to the rule in reference to preliminary injunctions stated in *Shrewsbury* v. *Railroad Co.*, 1 Sim. (N. S.) 410-426: "That there are two points on which the court must satisfy itself. First, it must satisfy itself, not that the plaintiff has certainly a right, but that he has a fair question to raise as to the existence of such a right. The other is whether 'interim' interference, on a balance of convenience or inconvenience to the one party and to

the other, is or is not expedient." In *United States* v. *Brotherhood of Locomotive Firemen and Enginemen, et al.,* 104 F. Supp. 741 (D. C. N. D. Ohio), Judge FREED, in passing upon an application for a preliminary injunction by the United States against unions to prevent participation in a strike, where it was claimed that, without such injunctive relief, there would result irreparable damage to the security of the United States, held that the court "is empowered to issue the necessary order, reserving its decision of jurisdiction to a time when, after a full hearing, adequate study and reflection will be afforded to properly interpret and apply the law." "The granting or denial of a temporary injunction pending final hearing is within the sound judicial discretion of the trial court, and upon appeal an order granting such an injunction will not be disturbed unless contrary to some rule of equity or the result of an improvident exercise of judicial discretion. Especially will the granting of a temporary writ be upheld when the balance of injury as between the parties favors its issue. . . . If the questions presented by a suit for an injunction are grave and difficult and the injury to the moving party will be certain, substantial and irreparable if the motion for a temporary injunction is denied and the final decision is favorable, while if the motion is granted and the decision is unfavorable the inconvenience and loss to the opposing party will be inconsiderable . . . , the injunction should be granted." *Pratt* v. *Stout,* 85 F. 2d 172, 176 (C. C. A. 8). When the nature of the questions which arise upon a suit make them a proper subject for deliberate examination, and if a stay of proceedings will not result in too great injury to the defendants, it is proper to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined. *Hadden, et al.* v. *Dooley, et al.,* 74 F. 429 (C. C. A. 2). Ordinarily, an appellate court, upon an appeal from an order granting or denying a temporary injunction, will not go into the merits of a case further than is necessary to

determine whether the trial court exceeded a reasonable discretion in making the order, and this is especially true where the rights of the parties can be better determined upon full proof of the facts. *Allen* v. *Omaha Live Stock Commission Co.*, 275 F. 1 (C. C. A. 8). See also *Benson Hotel Corporation* v. *Woods*, 168 F. 2d 694 (C. C. A. 8).

On the balance of injury between the parties resulting from issuance of the temporary injunction in this case, it is obvious that if appellee's allegations in his bill of complaint are true, denial of the injunction would result in substantial and irreparable damage to him, while, on the other hand, the issuance of the temporary injunction would result in inconsiderable damage—if any—to appellants.

As to the issuance of the temporary injunction in violation of the Norris-LaGuardia Act, Title 29, U. S. C. A., Sections 101, et seq., we do not perceive that there was any controversy between the American Federation of Musicians and appellee involving, or growing out of, a labor dispute, within the meaning of the Act. Title 29 U. S. C. A., Section 113.[1] In stating the following facts,

[1] Title 29 U. S. C. A., Section 113, provides:

"*Definitions of terms and words used in chapter*

"When used in sections 101-115 of this title, and for the purposes of such sections—

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

we are limited to the record which was before the district court. The controversy arose out of a breach of contract of a band leader to appear for a public performance. Pursuant to contract stipulations, the matter of liability and damages was submitted to the arbitration of the American Federation of Musicians. When the Federation took no action, appellee brought suit against the band leader and forced payment of damages by him. The Federation, because of appellee's action and recovery of damages against the band leader, placed appellee's name on its unfair list. The district court, in granting a temporary injunction to prevent irreparable injury, did not issue it in any case involving or growing out of a labor dispute.[2] On the record before us, the controversy between appellee and the band leader was a plain case of breach of contract. We have considered none of the affidavits purporting to show that the members of the band were employees and appellee was their employer, which were included in appellants' appendix, and which were filed subsequent to the

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

"(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia. Mar. 23, 1932, c. 90, Sec. 13, 47 Stat. 73."

[2] The Norris-LaGuardia Act curtailed the equity jurisdiction of federal courts in the field of labor disputes. Where the equity jurisdiction of the court is founded upon interstate and foreign commerce, it would seem that, in any event, the booking of an orchestra was not within the provisions of the Act. Contracts negotiated for vaudeville entertainment are for personal services and are not a subject of commerce under the Sherman Anti-Trust Act. *Hart* v. *B. F. Keith Vaudeville Exchange*, 12 F. 2d 341 (C. C. A. 2); see also *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271. Contracts with baseball players are, likewise, for personal services and are not a subject of trade or commerce. *Federal Baseball Club* v. *National League*, 259 U. S. 200; *Toolson* v. *New York Yankees*, 346 U. S. 356. See also Title 12 U. S. C. A., Section 15, for definition of "commerce" in Sherman Anti-Trust Act, and Title 29 U. S. C. A., Section 152, for definitions of "commerce" and "affecting commerce" in Labor-Management Relations Act. If the contract negotiated for the playing of an orchestra is for personal services, it would not come within the provisions of the Norris-LaGuardia Act, relating to labor disputes of which federal courts have jurisdiction under the commerce clause.

order of the district court granting the temporary injunction, which have never been before the court for determination of any of the issues in the case. It is to be noted that even in cases where the Norris-LaGuardia Act is applicable, the district court, in certain circumstances, has the power to issue a restraining order for the purpose of preserving existing conditions, pending a decision on its own jurisdiction. *United States* v. *United Mine Workers of America,* 330 U. S. 258.

In ascertaining the propriety of the issuance of the temporary injunction in this case, we are, then, confronted, in the light of the authorities above mentioned, with the consideration whether the questions presented by this suit are grave and difficult. Appellee insists there is diversity of citizenship while appellants contend that the district court is without jurisdiction on grounds of diversity since the defendant, American Federation of Musicians, is an unincorporated association with its principal office in New York City, while many of its members are citizens of the same state as plaintiff-appellee; that the citizenship of an unincorporated association is that of its members, and that diversity does not exist if any of its members are citizens of the same state as is any adverse party to the action, citing *Rosendale, et al.* v. *Phillips, et al.,* 87 F. 2d 454 (C. C. A. 2); *Levering & Garrigues Co.* v. *Morrin,* 61 F. 2d 115 (C. C. A. 2); *Ex parte Edelstein,* 30 F. 2d 636 C. C. A. 2). The *Rosendale* case held that a suit by an unincorporated membership association and certain of its officers and members against other members could not be maintained on grounds of diversity of citizenship unless all plaintiffs were of different citizenship than all defendants. In the *Levering* case, it was held that the actual residence of the individual members of an unincorporated labor union was determinative of the citizenship of the union for purposes of federal jurisdiction on grounds of diversity. In the *Edelstein* case, it was likewise held that

the citizenship of an unincorporated union was that of its individual members. There was, however, a strong dissenting opinion to the effect that the nationwide extension of unincorporated bodies and their treatment as separate entities for collective bargaining and dealing provided new and different reasons for considering them as having a residence and a citizenship; and it was said that an unincorporated association would seem to have an equal claim to a status as a separate entity and citizenship separate from its members, as a corporation is regarded separately from its shareholders. This view was based upon the opinion of Chief Justice Taft in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, in which it was held that unincorporated labor unions, having been recognized as distinct entities by numerous acts of Congress, are suable, as such, in federal courts upon process served on their principal officers, for torts committed by them in strikes, and that their funds are subject to execution. Although the case was brought against the union, under the provisions of Sherman Anti-Trust Act, the conclusion of the court that a union was suable appears to have been based upon the general state of the law, and "the suability of the defendants is *confirmed* in the case at bar by the words of Sections 7 and 8 of the Anti-Trust Law" (emphasis supplied). In *Moffat Tunnel League* v. *United States*, 289 U. S. 113, it was held that a voluntary association had no capacity to sue to set aside an order of the Interstate Commerce Commission, unless authorized by statute.

However, according to Rule 17(b) of the Federal Rules of Civil Procedure, the capacity of an unincorporated association to sue or to be sued shall be determined by the law of the state in which the district court is held. The Federal Rules of Civil Procedure have the force and effect of statutes, and if there is conflict between procedure provided in an earlier act of Congress, and that provided by the rules, the former must yield to the

latter; and all laws in conflict with such rules shall be of no further force and effect. *Winsor* v. *Daumit,* 179 F. 2d 475 (C. A. 7); Title 28 U. S. C. A., Section 2071.

Unincorporated associations and organizations, resident or nonresident, doing business, or performing any of the acts for which they were formed, may be sued in the State of Tennessee, and service of process may be had upon their agents appointed for service of process, or upon the Secretary of State of Tennessee if such process agent is not appointed. Sections 8681.1, 8681.2, and 8681.3 of Williams Tennessee Code Annotated, 1952 Cumulative Supplement. The Federal Rules of Civil Procedure also provide for service of process upon an unincorporated association which is subject to suit under a common name, and which is held to be sufficient if service is made in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction in that state. Rule 4(d)(3) and (7).

In cases where jurisdiction is founded on diversity of citizenship, it is a question whether an unincorporated labor union having the capacity to sue or to be sued in its own name, is to be considered a citizen of the State where its principal place of business is located. The Supreme Court has never passed upon the question. However, the rule that the citizenship of unincorporated associations generally is that of its members, seems to be losing its vitality. "There is some evidence . . . that the present federal rule is undergoing change, for the Supreme Court has treated a *sociedad en comandita* organized under Puerto Rico law as a citizen and resident of Puerto Rico for purposes of federal jurisdiction." Moore's Federal Practice, Volume 3, page 1413

(2d Edition).[3] In the case above referred to, *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, the court held that a *sociedad en comandita* under the laws of Puerto Rico was not a limited partnership in the common-law sense, but a juridical person, with a personality like that of a corporation, and that it had the status of a corporation for purposes of federal jurisdiction, that is, citizenship. The court observed that for almost a century, in ascertaining whether there was the requisite diversity of citizenship to confer jurisdiction on the federal courts, it looked to the domicil of a corporation, not that of its individual stockholders, as controlling; that, in its final form, the rule of jurisdiction was stated in terms of a conclusive presumption that the stockholders were citizens of the state of the corporate domicil; but that the theoretical justification for the rule was found only in the complete legal personality with which corporations are endowed. The court said:

> "This treatment of the aggregate for other purposes as a person distinct from its members, with capacity to perform all legal acts, made it possible and convenient to treat it so for purposes of federal jurisdiction as well. But status as a unit for purposes of suit alone, as *in the case of a joint stock company,*

[3] Professor Moore, however, also observes: "In order that the last sentence of Rule 17(b) be generally effective in cases where jurisdiction is founded upon diversity of citizenship the present federal rule on jurisdiction must be changed: the partnership or other unincorporated association which is given capacity to sue or be sued must be endowed with 'citizenship,' for purposes of federal jurisdiction. Such treatment might well be accorded them, and could be worked out along lines developed in the corporate field. But it should be clearly understood that this is a suggestion as to how the law should develop and not a statement as to present law." (Page 1413.)

There are a number of authorities holding to the same effect as *Rosendale, et al.* v. *Phillips, et al., supra; Levering & Garrigues Co.* v. *Morrin, supra;* and *Ex parte Edelstein, supra.* In *Russell* v. *Central Labor Union, et al.*, 1 F. 2d 412, 414 (D. C. Ill.), in an opinion by Judge Lindley, it was said: "It is argued that, prior to 1844, corporations were not regarded as possessing the attributes of citizenship independent from that of their stockholders, and that the step forward then taken, recognizing them as separate entities and granting jurisdiction, upon the ground of diversity of citizenship, where the residence of the corporation was diverse to that of the opposing party, was only a forerunner of an equivalent development in the law governing voluntary associations. The logic of such reasoning is not without force, but such positive modification of the law should be made by the Supreme Court."

> . . . *or a limited partnership,* not shown to have the other attributes of a corporation, . . . has been deemed a legal personality too incomplete; what was but an association of individuals for so many ends and a juridical entity for only a few, was not easily to be treated as if it were a single citizen.
>
> "The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships. . . . The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise. . . . In the law of its creation the *sociedad* is consistently regarded as a juridical person." (Emphasis supplied.)

The court goes on to say that such a *sociedad* may contract, own property, and transact business, sue and be sued in its own name and right; that its members are not thought to have a sufficient personal interest in a suit brought against the entity to enable them to intervene as parties defendant; that it is created by articles of association filed as public records; that where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members; that powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited and that they alone may perform acts legally binding on the *sociedad;* that its members are not primarily liable for its acts and deeds, and its creditors are preferred with respect to its assets and property over the creditors of individual members, although the latter may reach the interests of individual members in the common capital; that although the members whose participation is unlimited are made contingently liable for the debts of the *sociedad* in the event that its assets are insufficient to satisfy them, this liability is of no more consequence for present purposes than that imposed on corporate stockholders by the statutes of some states; and that these characteristics, under the Codes of Puerto

Rico, give content to their declaration that the *sociedad* is a juridical person. It is to be observed that the court stated that associations such as joint stock companies and limited partnerships had been deemed too incomplete as legal personalities to be treated as single citizens, but did not extend such an "incomplete" status to unincorporated labor unions.

The foregoing are the attributes which are pointed out by the Supreme Court as compelling the recognition of the Puerto Rican association as a juridical person, equivalent to a corporation, for purposes of citizenship, in cases in which jurisdiction is founded upon diversity of citizenship. But the attributes of unincorporated labor unions, which were pointed out by Chief Justice TAFT in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, were much more impressive to compel recognition of unincorporated labor unions as juridical persons equivalent to corporations for purposes of citizenship in cases in which jurisdiction is founded upon diversity of citizenship. Thus, Chief Justice TAFT pointed out that the unincorporated labor association there before the court was a national organization; that it was intended to be the union of all workers employed in the particular industry in question, on the American continent; that its declared purpose was to increase wages and improve conditions of employment of its members by legislation, conciliation, joint agreement, and strikes; that it was composed of workmen eligible to membership, and was divided into districts, sub-districts, and local unions; that the ultimate authority was a general convention to which delegates selected by the members in their local organizations were elected; that the body governing the union in the interval between the conventions was a board consisting of the principal officers, the president, vice president, and secretary-treasurer, together with a member from each district; that the president had great power; that when the board

was not in session, the individual members were obliged to do what he directed them to do; that the machinery of the organization was directed largely toward propaganda, conciliation of labor disputes, the making of scale agreements with employers, the discipline of officers, members, districts, and locals, and toward strikes and the maintenance of funds for that purpose; that it was admirably framed for unit action under the direction of the national officers; that it had a weekly journal, whose editor was appointed by the president, and which published all official orders and circulars, and all of the union news; that each local union was required to be a subscriber, and its official notices were to be brought by the secretary to the attention of the members; that the initiation fees and dues collected from each member were distributed between the national treasury, the district treasury, and that of the local; that the board was to prescribe conditions under which strikes were to be financed by the union and the amount of strike relief to be furnished the striking members; that the membership of the union had reached 450,000, and that the dues received from them for the national and district organizations made a very large annual total, and the obligations assumed in traveling expenses, holding of conventions, and general overhead cost, but most of all for strikes, were so heavy that an extensive financial business was carried on, money was borrowed, notes were given to banks, and in every way, the union acted as a business entity, distinct from its members.

On this aspect of the case, Chief Justice TAFT concluded: "No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies."

The description of the attributes of the United Mine Workers of America, as related by Chief Justice TAFT, may, upon the trial of the instant case, be found equally applicable to the American Federation of Musicians.

Whether, in the light of *Puerto Rico* v. *Russell & Co., supra,* such national unions, with unity of action and power centered in their governing executive bodies, may be considered by the Supreme Court to be juridical persons equivalent to corporations for purposes of citizenship in cases in which jurisdiction is founded upon diversity of citizenship, is a question which, as far as this proceeding is concerned, is properly, in the first instance, subject to the consideration of the district court, where its determination, by virtue of the order of the court granting the preliminary injunction, abides the hearing.

Perhaps the most recent case in which the question has been determined is in *Van Sant* v. *American Express Co.,* 169 F. 2d 355 (C. C. A. 3), where a New York joint stock association was treated as a corporation for purposes of diversity and, hence, as a citizen of New York. In its opinion, the court observed (in a footnote) that the old rule "that generally speaking an unincorporated association has no citizenship for diversity purposes is itself beginning to shows signs of being outmoded."[4]

With regard to whether there was compliance with Title 29 U. S. C. A., Section 107, respecting the filing of findings of fact, this relates only to the issuance of injunctions in cases involving labor disputes under the Norris-LaGuardia Act, which is here inapplicable. It is to be said, however, that the district court, in its order issuing the injunction, set forth that, upon consideration of all matters presented, it appeared that "unless this temporary injunction issues, the plaintiff will suffer irreparable damages, inasmuch as his name will be carried on the 'unfair list' published monthly in defendant's official magazine, and which will

[4] That the entire law has changed within the last forty years, with relation to labor unions and litigation, and the conception of a legal entity of an unincorporated association as distinguishable from that of its members, is discussed in the interesting opinion of Chief Justice Groner in *Busby* v. *Electric Utilities Employees Union,* 147 F. 2d 865 (C. A. D. C.).

prevent him from making contracts . . . for the fall season, which will begin shortly."

As to the listing of appellee as "unfair," this was not done in the course of a labor dispute, nor did it arise out of a labor dispute. It is alleged, and not traversed, that the action of appellants constituted an automatic boycott; that it resulted in appellee's being totally prevented from carrying on his profession; that it was libelous, and done with the intent to injure and defame him, and to damage him in his business. If these allegations were proved, the circulation of the unfair list could not be said to be merely an expression of opinion. The law does not allow a citizen's rights to be destroyed under a perversion of freedom of speech. See *Wisconsin Employment Relations Board* v. *Milk and Ice Cream Drivers & Dairy Employees Union, Local No. 225,* 238 Wis. 379, 299 N. W. 31, cert. denied, *Milk & Ice Cream Drivers and Dairy Employees Union, Local No. 225* v. *Wisconsin Employment Relations Board,* 316 U. S. 668.

Whether there was diversity of citizenship; whether the American Federation of Musicians was doing business in the State of Tennessee or subject to service of process there; whether it was suable by service upon Mr. Cooper as its representative—these and other questions going to the jurisdiction of the district court to entertain the case were grave and difficult, and justified the district court in its issuance of the preliminary injunction in order to reserve its decision on jurisdiction to a time when, after a hearing, adequate study and reflection would be afforded properly to interpret and apply the law.

In consideration of the foregoing, the order of Judge Davies, issuing the preliminary injunction, is sustained.

## Judgment

(Filed June 16, 1954)

Appeal from the District Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court issuing the preliminary injunction in this cause, be and the same is hereby sustained.

[redacted]

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 343.

THE AMERICAN FEDERATION OF MUSICIANS, a Voluntary Organization, JAMES C. PETRILLO, Individually and as President of The American Federation of Musicians, and GEORGE COOPER, Individually and as Representative of The American Federation of Musicians, Local Union Number 257, With Offices in Nashville, Tennessee,
Petitioners,

v.

ABE STEIN, a Resident of Davidson County, Tennessee,
Respondent.

## RESPONSE

**To the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.**

The respondent, Abe Stein, respectfully states in response to the petition for writ of certiorari heretofore filed in this cause as follows:

The initial hearing in this cause was had in the United States District Court for the Middle District of Tennessee, Nashville Division, before the Honorable Elmer D.

Davies, Judge, on August 5th, 1953, and was carried over until August 7th, 1953, with the result that there are two transcript folios of the proceedings. For convenience, wherever reference is made to Transcript Folios of the hearings that of August 5th, 1953, will be referred to as Folio No. 1 and that of August 7th, will be Folio No. 2.

The original complaint in this cause was filed on July 30th, 1953, by Abe Stein, respondent, a citizen and resident of the State of Tennessee against the American Federation of Musicians, James C. Petrillo, President of the American Federation of Musicians, and George W. Cooper, Jr., representative of the American Federation of Musicians, Local No. 257, with offices in Nashville, Davidson County, Tennessee, and by subsequent amendment the American Federation of Musicians, a voluntary organization, with headquarters in New York State. The complaint and the said amendment thereto, sought an injunction to restrain the Petitioners from listing Respondent as "UNFAIR" and for damages resulting from Petitioners having so listed Respondent in the official journal of American Federation of Musicans of the United States and Canada as "UNFAIR."

On July 30th, 1953, a motion for permanent injunction and notice of same was filed. Copies of said motion and notice of same were mailed to Petitioner, James C. Petrillo, President of the American Federation of Musicians, to the Federation, and handed to the Honorable Jordon Stokes, III, local attorney representing George W. Cooper, Jr., President of the American Federation of Musicians Local Union No. 257.

On August 5th, 1953, the motion was heard in part, but at the insistence of the Honorable Jordon Stokes, III, the hearing was carried over to August 7th, 1953, at which time argument was heard by the court by attorneys for

all parties; at the close of the hearing the court granted a temporary injunction against all defendants.

Folio No. 1 of this record sets out in detail the proceeding of August 5th, 1953, and Folio No. 2 the proceedings of August 7th, 1953, as aforesaid.

Honorable Jordon Stokes, III, local counsel for the petitioners appeared on both dates and argued the question of sufficiency of notice, as well as the question of diversity of citizenship between the parties (See Folio No. 1, pages 2, 5-8) (Folio No. 2, pages 2-21).

Respondent respectfully states that at the hearing on August 7th, 1953, Respondent introduced evidence on the question of diversity of citizenship and notice to the Petitioners (Folio No. 2, pages 2-21).

Attorney representing the Petitioners introduced affidavits of Petitioners, James C. Petrillo and George W. Cooper, Jr., in an effort to refute and deny the existence of diversity of citizenship and the sufficiency of the service of process, Respondent's motion and notice of the hearing (Folio No. 2, pages 2-5).

At the conclusion of the argument the court granted a temporary injunction, conditioned upon the execution of a bond in the penal sum of $500.00, which was duly executed and filed, and an order was entered upon the minutes of the said court for August 7th, 1953.

On August 6, 1953, a motion to dismiss the complaint was filed by Petitioner, George W. Cooper, Jr., representative of the American Federation of Musicians Local No. 257, but, Respondent respectfully states, no effort has been made by said Petitioner or either of his fellow Petitioners, to dispose of said motion and same is now pending before the United States District Court for the Middle District of Tennessee.

On August 20th, 1953, a second motion to dismiss the complaint was filed by Petitioner, George W. Cooper, Jr., representative of the American Federation of Musicians Local Union No. 257, this motion likewise has not been heard by the Court.

On August 26th Petitioners filed a notice of motion and motion to dissolve or vacate the temporary injunction granted on August 7th, 1953, accompanied by: (1) affidavit of A. Rex Ricardi, First Assistant to President of American Federation of Musicians of United States and Canada; (2) supplemental affidavit of A. Rex Ricardi, with exhibits thereto attached; and (3) affidavit of Jordon Stokes, III, local attorney for Petitioners. This motion to dissolve is also now pending.

On September 2nd, 1953, Petitioners filed notice of appeal from the order of August 7th, 1953, which granted the temporary injunction. It is respectfully insisted by Respondent that only upon this appeal and this appeal alone, was this cause heard before the Honorable United States Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, on April 20th, 1954.

Respondent respectfully shows that the petition for writ of certiorari before this Honorable Court does not make clear the true status of the record in this cause. **There has been only one order entered in this cause from which an appeal has been taken, that order having been entered by the United States District Court for the Middle District of Tennessee, Nashville Division, on August 7th, 1953, which said order granted the temporary injunction.** Not one of the other questions raised by the various motions of the Petitioners or the other pleadings in this cause have been presented before or acted upon by the United States District Court. (Opinion of June 16, 1954, page 15.)

It is respectfully submitted that it appears, in the petition for certiorari, that application was made to the presiding judge of the United States Court of Appeals, for the Sixth Circuit at Cincinnati, Ohio, to have a special judge designated to hear Petitioners' motion of August 26th, 1953; upon denial of this application Petitioners thereupon prayed for and perfected their appeal to the United States Court of Appeals for the Sixth Circuit, on September 2nd, 1953. (Petition for Writ of Certiorari, page 7.)

Respondent respectfully submits that Petitioners have, in their petition for certiorari, to this Honorable Court and in their brief in support of said petition, projected into this record, as accomplished, things which have not happened or transpired and upon which no action has been taken by the United States District Court, from which an appeal or review could be sought.

The petition for certiorari herein seeks to have the action and opinion of the United States Court of Appeals for the Sixth Circuit of June 16th, 1954, reviewed because of the position and contentions, of petitioners, on the diversity of citizenship, were not sustained. In support of their petition, in addition to the record which was before the United States District Court, the Petitioners have caused to be certified and transmitted to this Honorable Court certain documents, motions and affidavits which are not relative nor pertinent to the order of the United States District Court for the Middle District of Tennessee, entered August 7th, 1953, from which the appeal was taken. Many of said motions, affidavits, etc., filed after the August 7th hearing, and to date are undisposed of by the lower court.

At the conclusion of the hearing before the Honorable United States Court of Appeals for the Sixth Circuit, the

court requested Respondent's attorney to furnish authorities in support of Respondent's position that there was a diversity of citizenship in this cause which gave the lower court jurisdiction. It is respectfully submitted that Respondent prepared and filed, within the time allowed, a supplemental brief on this particular question, in which Respondent relied heavily upon the case of United Mine Workers v. Coronado Coal Company, 259 U. S. 344, 42 Supreme Court Reports 570, 66 Law Edition 975, 27 A. L. R. 672.

Respondent now having fully answered respectfully prays that the Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, sought by petitioners be denied and he be hence dismissed with his reasonable costs, for the reasons hereinabove stated and in view of the authorities hereinafter cited and relied upon.

JONOTHON J. FOLEY, JR.,
Attorney for Respondent,
Abe Stein.

HARRY S. LESTER,
Of Counsel for Respondent.

## REASONS FOR DENIAL OF THE WRIT.

### I.

### The United States District Court Has Jurisdiction in an Action Where Diversity of Citizenship Appears; Whether Defendant Be Sued as an Individual or as the Representative of a Group or Class.

It is respectfully submitted that diversity of citizenship between the parties in this litigation is clearly established in the record (Record Folio No. 2, pages 7-13).

The opinion of the United States Court of Appeals for the Sixth Circuit, filed June 16th, 1954, states:

> "That the Appellants contend that the district court was without jurisdiction to issue the preliminary injunction inasmuch as there was no diversity of citizenship * * *." Opinion, page 1.

Further, that:

> "Appellee insists there is diversity of citizenship while appellants contend that the district court is without jurisdiction on grounds of diversity since the defendant, American Federation of Musicians, is an unincorporated association with its principal office in New York City, while many of its members are citizens of the same state as plaintiff-appellee; that the citizenship of an unincorporated association is that of its members; and that diversity does not exist if any of its members are citizens of the same state as is any adverse party to the action (citing cases), * * *." Opinion, page 8.

* * * * * * *

> "In cases where jurisdiction is founded on diversity of citizenship, it is a question whether an unincorpo-

rated labor union having the capacity to sue or to be sued in its own name is to be considered a citizen of the state where its principal place of business is located. The Supreme Court has never passed upon the question. However, the rule that the citizenship of unincorporated associations generally is that of its members, seems to be losing its vitality. 'There is some evidence . . . that the present federal rule is undergoing change, for the Supreme Court has treated a sociedad en comandita organized under Puerto Rico law as a citizen and resident of Puerto Rico for purposes of federal jurisdiction.' Moore's Federal Practice, Volume 3, page 1413 (2d Edition). In the case above referred to, Puerto Rico v. Russell & Co., 288 U. S. 476, the court held that a sociedad en comandita under the laws of Puerto Rico was not a limited partnership in the common-law sense, but a juridical person, with a personality like that of a corporation, and that it had the status of a corporation for purposes of federal jurisdiction, that is, citizenship. The Court observed that for almost a century in ascertaining whether there was the requisite diversity of citizenship to confer jurisdiction on the federal courts, it looked to the domicil of a corporation, not that of its individual stockholders, as controlling; that, in its final form, the rule of jurisdiction was stated in terms of a conclusive presumption that the stockholders were citizens of the state of the corporate domicil; but that the theoretical justification for the rule was found only in the complete legal personality with which corporations are endowed. The court said:

> " 'This treatment of the aggregate for other purposes as a person distinct from its members, with capacity to perform all legal acts, made it possible and convenient to treat it so for purposes

> of federal jurisdiction as well. But status as a unit for purposes of suit alone, as in the case of a joint stock company, . . . or a limited partnership, not shown to have the other attributes of a corporation, . . . has been deemed a legal personality too incomplete; what was but an association of individuals for so many ends and a juridical entity for only a few, was not easily to be treated as if it were a single citizen.
>
> " 'The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships . . . The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise . . . In the law of its creation the sociedad is consistently regarded as a juridical person' " (Opinion, pages 10-11).

It is further submitted that the attributes of unincorporated labor unions which were pointed out by the late Chief Justice of this Court, the Honorable William Howard Taft, in the case of United Mine Workers v. Coronado Coal Company, supra, are more impressive and compel the recognition of unincorporated labor unions as judicial persons equivalent to corporations for the purpose of citizenship in cases in which juirsdiction is founded upon diversity of citizenship. In further dscussing the reasoning of the Coronado case the United States Court of Appeals in its Opinion said:

> "On this aspect of the case, Chief Justice Taft concluded: 'No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies.'
>
> "The description of the attributes of the United Mine Workers of America, as related by Chief Justice Taft, may, upon the trial of the instant case, be found equally applicable to the American Federation

of Musicians. Whether, in the light of Puerto Rico v. Russell & Co., supra, such national unions, with unity of action and power centered in their governing executive bodies, may be considered by the Supreme Court to be juridical persons equivalent to corporations for purposes of citizenship in cases in which jurisdiction is founded upon diversity of citizenship, is a question which, as far as this proceeding is concerned, is properly, in the first instance, subject to the consideration of the district court, where its determination, by virtue of the order of the court granting the preliminary injunction, abides the hearing" (Opinion pages 13-14).

Respondent respectfully insists in view of the great weight of authority the Petitioner's contention that there is no diversity of citizenship in this record is without merit.

It has been stated by this Honorable Court in the United Mine Workers v. Coronado, supra, in discussing the suable character of a voluntary association or an unincorporated organization as follows:

> "More than this, equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued (Story Eq. Pl., 8th ed., ## 94, 97; St. Germain v. Bakery & Workers' International Union, 97 Wash. 282, L. R. A. 1917F, 824, 166 Pac. 665; Branson v. Industrial Workers, 30 Nev. 270, 96 Pac. 354; Barnes v. Chicago Typographical Union, 232 Ill. 402, 14 L. R. A. [N. A.] 1150, 122 Am. St. Rep. 129, 83 N. E. 932); and this has had its influence upon the law side of litigation, so that, out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be

recognized in some jurisdictions, and many suits for and against labor unions are reported in which no question has been raised as to the right to treat them in their closely united actions and functions as artificial persons, capable of suing and being sued. It would be unfortunate if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of 450,000 members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. To remand persons injured to a suit against each of the 450,000 members to recover damages and to levy on his share of the strike fund would be to leave them remediless."

* * * * * * *

"Though such a conclusion as to the suability of trades-unions is of primary importance in the working out of justice and in protecting individuals and society from possibility of oppression and injury in their lawful rights from the existence of such powerful entities as trade-unions, it is, after all, in essence and principle merely a procedural matter. As a matter of substantive law, all the members of the union engaged in a combination doing unlawful injury are liable to suit and recovery, and the only question is whether, when they have voluntarily, and for the purpose of acquiring concentrated strength and the faculty of quick unit action and elasticity, created a self-acting body, with great funds to accomplish their purpose, they may not be sued as this body and the funds they have accumulated may not be made to satisfy claims for injuries unlawfully caused in carrying out their united purpose."

Further in this same learned Opinion the Court discussed the legislation which had been enacted during recent years which recognized labor unions as legal entities and gave them rights and responsibilities. The particular law under consideration in the Coronado case was the Sherman Anti-Trust Law. The substance of the interpretation as to its applicability to Labor Organizations is clear and concise and it covers the Petitioners. The concluding paragraphs of the Opinion are as follows:

> "Our conclusion as to the suability of the defendants is confirmed in the case at bar by the words of ##7 and 8 of the Anti-Trust Law. **The persons who may be sued under #7 include 'corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country'** (July 2, 1890, 26 Stat. at L. 210, chap. 647, Comp. Stat. #8830, 9 Fed. Stat. Anno., 2d ed., p. 726). This language is very broad, and the words, given their natural signification, certainly include labor unions like these. They are, as has been abundantly shown, associations existing under the laws of the United States, of the territories thereof, and of the states of the Union. Congress was passing drastic legislation to remedy a threatening danger to the public welfare, and did not intend that any person or combinations of persons should escape its application. Their thought was especially directed against business associations and combinations that were unincorporated to do the things forbidden by the act, but they used language broad enough to include all associations which might violate its provisions, recognized by the statutes of the United States or the states or the territories or foreign countries as lawfully existing; and this, of course, includes labor unions, as the legislation referred to shows. Thus it was that in the cases of

United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso., 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307, and Eastern States Retail Lumber Dealers Asso. v. United States, 234 U. S. 600, 58 L. ed. 1490, L. R. A. 1915 A, 788, 34 Sup. Ct. Rep. 951, unincorporated associations were made parties to suits in the Federal courts under the Anti-Trust Act without question by anyone as to the correctness of the procedure.

"For these reasons we conclude that the International Union, the District No. 21, and the twenty-seven local unions were properly made parties defendant here, and properly served by process on their principal officers."

The Coronado case has been followed and approved in many cases decided not only by this Honorable Court, but by lower courts of the great Federal judicial system.

Penn. R. Co. v. U. S. Railroad Labor Board, 261 U. S. 82, 67 Law. Ed. 541;
Hecht v. Malley, 265 U. S. 142, 68 Law. Ed. 958;
Brown v. United States (1927), 276 U. S. 142, 72 Law. Ed. 503.

In this case the court held:

"* * * That the alliance was an association within the meaning of this Section (Sec. 1, Sherman Anti-Trust Act of 1890), and therefore, subject to the provisions of the Act, is clear. The provisions of the Act creating criminal and civil liability against such an association necessarily carry the implication that it may be proceeded against by its common name to enforce the liability. Consequently for a violation of

the Anti-Trust Act it may be prosecuted, indicted and convicted and judgment rendered against it and satisfied by execution out of its assets." United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 66 L. E. 975.

In Neirbo Company v. Bethlehem Ship Building Corp., Ltd. (1939), 308 U. S. 169, 84 Law. Ed. 171:

In an opinion by Mr. Justice Frankfurter the court held:

"As to diversity cases, Congress has given Federal Courts 'Cognizance, concurrent with the courts of the several states.' "

Respondent respectfully calls this Honorable Court's attention to several other authorities which have followed the holding of the Supreme Court of the United States in the Coronado case (supra).

The case of Hansel v. Purnell, 1 Fed. 2nd 267 (1924), which arose in the United States District Court in Michigan and was brought up to this Honorable Court. It appears from the Opinion that a voluntary association as a distinct entity which may sue and be sued in a Federal Court, and where it has appeared and answered as a defendant it is subject to whatever decree may be entered in the suit.

In this case it appeared that in 1903 an ecclesiastical corporation was formed under the laws of Michigan. In 1907, upon objection by the State of Michigan that the corporation was more of a business than a religious organization, the corporation was dissolved and the Israelite House of David was formed as a voluntary religious association.

The plaintiffs joined the association in 1912. In 1920 they withdrew from the House of David and in 1921 filed a

bill in the U. S. District Court, Western District of Michigan, charging fraud and seeking to cancel certain agreements which plaintiffs had signed.

Defendants and all members of the association filed an Answer and Cross Bill, denying the allegations of fraud and fraudulent representations. Further alleging that in consideration of $100 and other considerations the complainants executed a written release. Defendants also filed a motion to dismiss for want of Federal jurisdiction and want of equity, which motion was overruled by the trial judge.

The trial court found for complainants and rescinded all conveyances and gave judgment to plaintiffs for $24,078.08. Defendants appeal. It appeared from the Opinion that:

> "The bill of complaint and the amendment thereto aver diversity of citizenship and that the suit involves claims and property rights in excess of $3,000.00 exclusive of interest and costs. For this reason the motion to dismiss for want of Federal Jurisdiction was properly overruled."

In the opinion by Circuit Judge Donahue it was, among other things, said:

> "The Israelite House of David is a voluntary association. As such it is a distinct entity, and may sue or be sued in the federal court. United Mine Workers et al. v. Coronado Coal Co. et al., 259 U. S. 344, 42 Supreme Court 750, 66 Law Ed. 975, 27 A. L. R. 672. The Israelite House of David, as such separate entity, joined in the answer and cross bill with other defendants, and the pleading was verified by Francis Thorpe, Trustee. For this reason the Israelite House of David was properly in court and subject to its jurisdiction in this action."

After discussing many other points raised by the 41 Assignments of Error, the decree of the District Court was affirmed.

A further approval of the principles of the Coronado Case, supra, is found in Russell v. Central Labor Union et al., 1 Fed. 2nd 412 (District Court for the Eastern District of Illinois).

The Opinion delivered by Mr. Justice Lindley discusses the Coronado case, supra, and distinguishes it from the case he is deciding; in doing so, however, he approves of the principles of the Coronado case, but arrives at a different conclusion because the facts would not warrant his adopting its principles.

In the course of the Opinion it is stated:

> "The question there presented is whether or not a voluntary association, suable in the Federal court, under the decision of the Supreme Court of the United States in the case of United Mine Workers of America et al. v. Coronado Coal Co. et al., 259 U. S. 344, 43 Sup. Ct. 570, 66 Law Ed. 975, 27 A. L. R. 762, may be brought into the United States District Court as a party defendant upon a showing that it is domiciled and has a place of business within the state and confines its activities to the said state, independent of the citizenship of its individual members, where jurisdiction of the court depends solely upon an averment that the plaintiff is a citizen of a state other than that in which the association is domiciled.
>
> "In the case of the United Mine Workers of America v. Coronado Coal Co. et al., supra, the Supreme Court **distinctly and definitely held that such voluntary organizations are suable in the federal court, evidently reasoning that the entity created voluntarily by the**

**members in perfecting their organization and carrying on multiplicious activities through boards of directors and regularly elected officers, was such, in the light of federal legislation regarding such associations, so distinct and separate from the entities of its individual members that the courts will recognize the same and treat it as a distinct and separate legal entity apart from that of its individual members. * * *"** (Emphasis supplied.)

Further discussing the Coronado case the Court said:

"It appears, therefore, that the **Supreme Court of the United States has announced the law as being that a voluntary association, under such circumstances as existed in the Coronado case, is suable in the United States Courts, but that no legal entity, though suable, may invoke the jurisdiction of the court, upon the ground of diverse citizenship, unless it appears that the individual members comprising this entity are citizens of states other than those of the opposing parties, except that corporations created by statutes of the various states** and of such character that the individual stockholders thereof have only participating interests in capital stock and have no legal title to the property of the corporation, are to be treated as citizens. The Coronado case was a step in advance of prior decisions in that it definitely decided that voluntary, unincorporated associations may be sued. * * *" (Empsasis supplied.)

The demurrer in this case was sustained because the facts presented were different from those in the case at bar.

The case of Christian v. International Association of Machinists et al., 7 Fed. 2nd 481, again affirmed and adopted the principle of the Coronado case by holding:

"The suability of the defendants is settled by the decision of the Supreme Court of the United States in the case of United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344."

From the case of Bobe v. Lloyds, 10 Fed. 2nd 732 (2nd Circuit—Mr. Justice Manton), it is seen in the opinion of the court that:

"The supreme court recently defined the term 'Association' as 'a term used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.' **See Hecht v. Malley, 265 U. S. 144, 68 Law Ed. 949.** There, a Massachusetts Trust created under the laws of Massachusetts was held to be an association within the meaning of the Anti-Trust law, a miners labor union was also considered an unincorporated association. United Mine Workers v. Coronado, 259 U. S. 344, and members of an unincorporated association of underwriters are liable as joint insurers under a certificate of insurance issued by their agents under and subject to conditions of a certain open policy the contents of which were unknown to the insurer, but the certificate stated it was issued by the association, although the policy was in fact made by members of the association in their separate individual capacity, and under its terms 'each underwriter was held to assume his proportionate part of the aggregate amount payable to the insured in the event of loss."

The case of State Farm Mutual Automobile Insurance Co. v. Mackenzie, 114 Fed. 2nd 728, 735, again cites the Coronado case, supra, with approval.

The Respondent submits that the question of diversity of citizenship between the parties to this litigation is as

yet to be determined and is a question which can only be determined after a full hearing on the merits of the case before the United States District Court, for the Middle District of Tennessee. The appeal from the temporary injunction granted by the lower court is the only matter which is properly presented by this record.

II.

**The Judge of the United States District Court Did Not Abuse His Discretion in Granting the Temporary Injunction Against the Petitioners.**

The Respondent respectfully shows that the service of process on Petitioners was properly and regularly had. It is admitted in the Transcript of the hearing of August 5th, 1953, Folio 1, as follows:

> "The Court: Has process or notice been served on the other Union, the National Union?
>
> Mr. Lester: Yes, sir, at their main office in New York City, N. Y., notice was not served on Mr. Stokes, but he has waived notice.
>
> Mr. Stokes: As I understand, your Honor, there has never been any legal service. He sent it to them in the mail. I don't think the Marshal has ever served it on them.
>
> The Court: Well, it wouldn't be necessary for the Marshal to serve it."
>
> • • • • • • • •
>
> "The Court: How do you propose to get process served on the American Federation of Musicians?
>
> Mr. Lester: Well, this local chapter here, or local Union, whatever they call it, is a part of The American Federation of Musicians, and I am just assuming

that the rules of the Federal Court and our State statutes would give us the right to——

The Court: (Interposing) Are they doing business in this State?

Mr. Lester: Yes, sir, I think that they certainly are doing business in this State. And, of course, the fact that they have a local union here is proof that they are doing business here. And that is the test. They have their offices here; they have their membership here; they have an elected official here. They are the American Federation of Musicians and for that reason they have been included in this lawsuit.

The Court: Now, what relief are you asking against the local union?

Mr. Lester: Well, I'm just including them with the American Federation of Musicians because they are a part of it.

The Court: All right, let me hear from Mr. Stokes, what do you have to say about it?

Mr. Stokes: As far as the injunction is concerned, we haven't done anything in the local union about this because there has been no process served on the American Federation as yet by anybody. Of course, the case was filed, I think, on July 31st and I understand he sent a copy of the complaint to Mr. Petrillo, but the Marshal hasn't served the original process.

The Court: How did you notify The American Federation of Musicians that this motion would be heard this morning?

Mr. Lester: I turned over sufficient copies to the Clerk so that one could be sent to the Marshal's Office, and I forwarded a copy of the complaint myself to Mr. Petrillo, and so certified on the complaint that it had been done.

The Court: With a copy of the motion.

Mr. Lester: Yes, sir, sent the motion and notice of the motion.

The Court: That it would be heard this morning?

Mr. Lester: Yes, sir, that it would be heard on August 5th."

* * * * * * *

"The Court: The American Federation of Musicians doesn't have any agent here, or do you know? Surely they have some agent here in Tennessee.

Mr. Lester: Well, I think that any officer in the local union is their agent here.

The Court: I don't know. Mr. Stokes says he doesn't think so.

Mr. Stokes: Well, of course, they are members of The American Federation of Musicians. There are the United Mine Workers * * *

The Court: Well, the plaintiff is the one that is the most interested in the matter. Of course, if you don't have jurisdiction of the defendant and I give you an injunction it won't be any good. If this Court doesn't have jurisdiction, you can't enforce it. So, if I give you a void injunction, don't blame me with it, now.

Mr. Stokes: Of course, I didn't come down to discuss jurisdiction, I didn't know that they had been served with any notice, I came down so if there is a motion to dismiss later I would be properly before the Court. No relief is prayed against us, they don't say that we did anything. Whether we are being sued directly or as agent, it is not quite clear.

The Court: Apparently he doesn't want you included in the injunction.

Mr. Stokes: Well, we haven't got anything to do with that.

The Court: Well, let the injunction be granted, a temporary injunction as prayed, and in the order granting that injunction give a full statement of the case, will you, and why the injunction was granted?

Mr. Lester: Yes, sir" (Folio 1, pages 7-9).

At the hearing of August 7th, 1953, the question of Notice and Process was again raised at which time the following transpired:

> "The Court: Now, for whom are you appearing, Mr. Stokes?
>
> Mr. Stokes: I am specially appearing for The American Federation of Musicians. I am appearing for the Nashville Local No. 257 of the American Federation of Musicians.
>
> Mr. Stokes: As your Honor knows, I raised the question that there wasn't sufficient notice and we decided that we would just hear it again today.
>
> The Court: That's right.
>
> * * * * * * * *
>
> "Mr. Stokes: That (Affidavit of James C. Petrillo) would address itself to lack of notice, **and I here waive any question of notice for the American Federation.**
>
> The Court: That is the reason it was put over until today.
>
> Mr. Stokes: That's right. **And we here waive any question of notice**" (Folio 2, pages 2, 3, emphasis supplied).

Respondent respectfully shows that personal service was obtained by mailing copies of the Complaint, the Motion and Notice of Motion to the Petitioners as required by the Rules of Civil Procedure governing service of Civil Process, Federal Courts, which rules are as follows, namely, 4 (D) (3); 4 (D) (7):

> "(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

"(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

* * * * * * * *

"(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

Respondent likewise complied with the statutes of the State of Tennessee then in full force and effect relating to service of Process on a non-resident which provides as follows:

1932 Edition, Sections 8676, 8677 and 8678, Williams' Annotated Code of Tennessee.

"8676. Foreign corporations suable here, when.—Any corporation claiming existence under the laws of the United States or any other state, or of any country foreign to the United States, or any business trust found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are by the laws thereof liable to be sued, so far as relates to any transaction had, in whole or in part,

within this state, or any cause of action arising here, but not otherwise.

"8677. When doing business here.—Any such corporation or trust having any transaction with persons, or having any transaction concerning any property situated in this state, through any agency whatever, acting for it within the state, shall be held to be doing business here within the meaning of section 8676.

"8678. Process, upon whom served, and duty of officials.—Process may be served upon any agent of said corporation or trust found within the county where the suit is brought, no matter what character of agent such persons may be; and, in the absence of such an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time the transaction out of which the suit arises took place, or, if the agency through which the transaction was had, be itself a corporation or business trust, then upon any agent of that corporation or trust upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom served, etc., in his return; and service of process so made shall be as effectual as if a corporation of this state were sued, and the process has been served as required by law; but, in order that defendant corporation or trust may also have effectual notice, it shall be the duty of the clerk immediately to mail a copy of the process to the home office of the corporation or trust by registered return-receipt letter, the postage and fees for which shall be taxed as other costs. The Clerk shall file with the papers in the cause a certificate of the fact of such mailing, including the receipt for such letter, if one, and make a minute thereof upon the docket, and no judg-

ment shall be taken in the case until thirty days after the date of such mailing."

In view of the foregoing, we believe the District Court did not abuse its discretion in granting the temporary injunction complained of, as Respondent complied with all the requirements of the Rules of Civil Procedure and the Statutes of Tennessee.

III.

**The Question Presented in This Case Is Not a Labor Dispute or Controversy.**

Respondent filed the complaint as heretofore shown on July 30th, 1953, in the United States District Court for the Middle District of Tennessee, seeking injunctive relief from acts of Petitioners and also asking for damages against Petitioners for their torts which had been committed by Petitioners. The acts which could be interpreted to form the basis of a labor controversy were not mentioned in the Complaint nor was any relief sought under the laws which are in full force and effect and are applicable to labor disputes.

Petitioners made an effort at the hearings before the United States District Court and again before the United States Court of Appeals to project a labor question or dispute into this litigation. Such contentions by the Petitioners are groundless. The sections of the Norris-LaGuardia Act which are quoted by petitioners in support of their application for the writ of certiorari herein are completely unrelated to a tort action for damages and the extraordinary injunctive relief sought by Respondent (Petition pages 18, 24).

The Opinion of the United States Court of Appeals of June 20, 1954, expressly pointed out as follows:

"As to the issuance of the temporary injunction in violation of the Norris-LaGuardia Act, Title 29, U. S. C. A., Section 101 et seq., we do not perceive that there was any controversy between the American Federation of Musicians and appellee involving, or growing out of, a labor dispute, within the meaning of the Act. Title 29, U. S. C. A., Section 113. In stating the following facts we are limited to the record which was before the district court. The controversy arose out of a breach of contract of a band leader to appear for a public performance. Pursuant to contract stipulations, the matter of liability and damages was submitted to the arbitration of the American Federation of Musicians. When the Federation took no action, appellee brought suit against the band leader and forced payment of damages by him. The Federation, because of appellee's action and recovery of damages against the band leader, placed appellee's name on its unfair list. The district court, in granting a temporary injunction to prevent irreparable injury, did not issue it in any case involving or growing out of a labor dispute. On the record before us the controversy between appellee and the band leader was a plain case of breach of contract. We have considered none of the affidavits purporting to show that the members of the band were employees and appellee was their employer, which were included in appellants' appendix, and which were filed subsequent to the order of the district court granting the temporary injunction, which have never been before the court for determination of any of the issues in the case. It is to be noted that even in cases where the Norris-LaGuardia Act is applicable, the district court, in certain circumstances, has the power to issue a restraining order for the purpose of preserving existing conditions, pending a decision on its own jurisdiction. United States v. United Mine Workers of America, 330 U. S. 258."

## CONCLUSION.

Respondent respectfully submits that the writ of certiorari sought and prayed for by Petitioners should not be granted. The United States Circuit Court of Appeals for the Sixth Circuit went into the whole controversy and as shown by its Opinion saw clearly the only question presented on the Appeal. It did not let the hue and cry of Petitioners in their many unsupported statements made in Argument sway it from the cardinal points in controversy. The learned Opinion of June 20th, 1954, should be adopted by this Honorable Court as the guide to be followed in acting upon the Petition and deny the prayer for a writ of certiorari.

Respectfully submitted,

JONOTHON J. FOLEY, JR.,
Attorney for Respondent,
Abe Stein.

HARRY S. LESTER,
Of Counsel for Respondent.

FILED
OCT 195
HAROLD B. WILLEY,

IN THE

# Supreme Court of the United States

OCTOBER TERM—1954

**No. 343**

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THE AMERICAN FEDERATION OF MUSICIANS, a voluntary organization, JAMES C. PETRILLO, individually and as President of The American Federation of Musicians, and GEORGE COOPER, individually and as Representative of The American Federation of Musicians, Local Union Number 257 with offices in Nashville, Tennessee,

*Petitioners,*

*against*

ABE STEIN, a resident of Davidson County, Tennessee,

*Respondent.*

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## PETITIONERS' REPLY BRIEF

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JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 182

IN THE

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OCTOBER TERM—1954

**No. 343**

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*Petitioners,*

*against*

ABE STEIN, a resident of Davidson County, Tennessee,

*Respondent.*

## PETITIONERS' REPLY BRIEF

Respondent's brief in opposition to the petition for certiorari only serves to emphasize three of the points urged by petitioners as reasons for granting the writ and reversing the judgment below:

1. There is no diversity of citizenship.

2. There was no service of process on two of the petitioners.

3. The Court below failed to pass on the jurisdictional questions raised before the District Court, on the erroneous ground that the District Court had, in effect, issued a tem-

porary stay and would hold a further hearing to consider and determine its jurisdiction. It is now 14 months since the petitioners were put under restraint, and each passing month makes more clear, if that is possible, what never was in doubt, that the District Court did not regard its injunction as tentative, pending consideration of the jurisdictional issues. It has not ordered, nor did it condition its injunction upon, a hearing on its jurisdiction, to say nothing of its failure to set for argument the motion to vacate and motions to dismiss the complaint (Resp. Br., pp. 3-4)—all of which again raised the jurisdictional questions. Contrary to respondent's suggestion (Resp. Br., p. 4), petitioners do not rely in their petition on any questions relating to the failure of the District Court, for more than a year, to hear the motions. The petition refers to the lack of any action on the motion to vacate only to support the conclusion which is inescapable from the order issuing the injunction—that the District Court had no intention of further examining the jurisdictional issues prior to trial. The additional motions mentioned in respondent's brief (Resp. Br., pp. 3-4) and the like failure of the District Court to act on them, surely corroborates that something is shockingly wrong in the administration of justice by injunction in the Middle District of Tennessee.

This reply brief is filed to point out the arguments made in the petition which have gone unanswered—major ones, in fact—and the misleading and improper nature of respondent's arguments:

1. Respondent's brief in opposition does not even attempt to answer the point that no diversity existed because, as the complaint itself alleges, Stein (the plaintiff) and Cooper (one of the defendants) are both citizens of the State of Tennessee.

2. (a) Nor has respondent attempted to answer the point that the Court of Appeals was required to pass upon

the jurisdictional issues which had been squarely presented to it upon the appeal. Respondent acknowledges that the District Court heard evidence and argument on the issue of jurisdiction (Resp. Br., pp. 3, 25), but by contrast with the opinion of the Court below, makes no claim that the District Court desired more time to consider these issues.

(b) Respondent, after stating that petitioners made two motions to dismiss the action and one to vacate the temporary injunction, asserts that no effort was made to have *one* of the motions to dismiss heard (Resp. Br., p. 3).

We know of no action which a party is required to take to have a motion heard other than to notice it for argument. That was done in the case of all the motions. As respondent acknowledges, petitioners unsuccessfully sought to have another Judge designated by the Chief Judge of the Court of Appeals to hear the motion to vacate when the District Judge became unavailable (Resp. Br., p. 5). In addition, petitioners wrote to the District Judge urging that the motion be heard, but the Judge replied that he could not set the motion for argument because he was busy with trials at least until February 1, 1954 (Record, pp. 20-1), and, to date, he has not heard the motion.

(c) Respondent alleges (Resp. Br., p. 2) that the motion for a temporary injunction was heard in part on August 5, 1953 and was carried over to August 7, 1954. As the record plainly shows, the District Court directed that a temporary injunction issue at the hearing of August 5, 1954. The additional hearing of August 7, 1953 was held, upon the request of Mr. Stokes made on August 6, 1953 (Record, p. 66), for the sole purpose of hearing the jurisdictional issues again. After that hearing, the injunction issued, unsupported by findings.

3. A number of misstatements are made by respondent on the question of service of process. The assertion that

petitioners admitted service of process is based on extracts from alleged material (Resp. Br., pp. 19-22) which was not in the printed transcript before the Court of Appeals and is not in the transcript certified to this Court. Moreover, the material quoted fails to support the conclusion drawn from it.

In the alleged material, the District Judge asked if "process or notice" had been served on the "National Union".* Respondent's counsel replied that it had been served on the Union in New York, but not upon Mr. Stokes** (attorney for Cooper) (Resp. Br., p. 19). When asked how such service was made, respondent's counsel merely asserted that he had mailed a copy of the notice of motion, of the motion and of the complaint to Mr. Petrillo (Resp. Br., p. 20). Of course, counsel's assertions, even if made, are not proof of the statements alleged.

Since the "Federation" (the unincorporated association) was not added as a party until the end of the August 7 hearing, the colloquy of August 5 could not have dealt with it. As to the claim of service on Mr. Petrillo, uncontradicted proof in the record shows that respondent mailed to Mr. Petrillo only a copy of the motion and the notice of motion, and not of the complaint (Record, p. 32). Neither service of process nor of the notice of motion was made upon the "Federation", and there is not even a claim to the contrary.

Respondent emphasizes a portion of the alleged material to claim a waiver of service of process and of notice of the motion for temporary injunction (Resp. Br., p. 22), but the material itself refers only to waiver of notice of the motion, not of service of process.

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* At this point, the Federation (the unincorporated association) was not even a party to the action. This reference therefore was to the corporation bearing the name, the American Federation of Musicians.

** This extract conflicts with respondent's statement on page 2 of his brief that notice of the motion was handed to Mr. Stokes. (See Record at pp. 64-5.)

Even if all of respondent's unproved claims of the proceedings are accepted, they do not prove service of process upon either Mr. Petrillo or upon the "Federation". Under the Federal Rules of Civil Procedure, service of the summons or complaint must be made by a United States marshal, his deputy or a person specially appointed by the Court for that purpose (Rule 4(c)), and service must be made within the state in which the district court is held in a diversity action (Rule 4(f)). There is no claim that any service was made by an authorized person upon Mr. Petrillo within the State of Tennessee.

The "Federation" was added as a party at the close of the hearing of August 7, 1953. No attempt was made to serve it, and the injunction order recites that service was unnecessary because Mr. Stokes appeared specially at the hearing to contest jurisdiction—a position in conflict with a decision of this Court (Pet., p. 12).

The complete answer to respondent's improper arguments as to service of process based on extracts of material not in the certified record is in the docket entries (Record, pp. 32-5). There is no entry showing service of process on either the "Federation" or Mr. Petrillo.

4. The cases cited by respondent in his brief at pages 8-18, while discussed in connection with the issue of the citizenship of an unincorporated association, do not deal with that question. Most of them relate to whether an unincorporated association may be sued as an entity. The one cited case which does deal with the question of the citizenship of the association entity, *Russell* v. *Central Labor Union*, 1 F. (2d) 412, is squarely opposed to respondent's contention (See quotation, Resp. Br., p. 17).

Moreover, the question of the citizenship of an unincorporated association, to which respondent devotes most of his brief, was not passed upon by the Court of Appeals.

This failure is one of the grounds upon which we ask this Court to issue its writ and set the case down for oral argument, if it does not reverse without argument, after allowing the writ because of the lack of diversity and the lack of service of process.

Respectfully submitted,

MURRAY GARTNER,
*Attorney for Petitioners.*

EMANUEL L. GORDON,
JORDAN STOKES, III,
*Of Counsel.*

FILED
OCT 20 1954
HAROLD B. WILLEY, CL

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

THE AMERICAN FEDERATION OF MUSICIANS, a Voluntary Organization; JAMES C. PETRILLO, Individually and as President of The American Federation of Musicians; and GEORGE COOPER, Individually and as Representative of The American Federation of Musicians, Local Union Number 257 With Offices in Nashville, Tennessee,

Petitioners,

vs.

ABE STEIN, a Resident of Davidson County, Tennessee,

Respondent.

No. 343.

## RESPONSE TO PETITIONERS' REPLY BRIEF.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

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## RESPONSE TO PETITIONERS' REPLY BRIEF.

The Respondent, Abe Stein, in answer to the Petitioners' Reply Brief, heretofore filed in this cause, states as follows:

The Reply Brief as filed by Petitioners again attempts to project into this record facts which do not exist and to make arguments that have no bearing whatsoever on the matters brought before the United States Circuit Court of Appeals by the Petitioners' Appeal completed September 2nd, 1953.

Respondent again respectfully points out to this Honorable Court that on August 26, 1953, Notice of Motion to Dissolve or Vacate the Temporary Injunction entered on August 7th, 1953, was filed in the United States District Court; on September 2nd, 1953, Notice of Appeal from this order was filed by Petitioners thereby stopping any action which the District Court could take on the motion to dissolve the injunction, and transferring the entire matter to the United States Circuit Court of Appeals at Cincinnati for review of the order of August 7th, 1953. It is a clear and well established principle that any matters pending in the United States District Court could not be heard, nor set for a hearing, until the disposition of appeal taken by Petitioners.

It is absurd for Petitioners to allege that the record in this cause and statements quoted from the Response to the Petition for Writ of Certiorari corroborate Petitioners' unwarranted allegation "that something is shockingly wrong in the administration of justice by injunction in the Middle District of Tennessee". Respondent denies this statement and charges that same was made by Petitioners in a desperate effort to discredit and reflect upon the sincerity and integrity of the Honorable Elmer D. Davies, Judge of the United States District Court for the Middle District of Tennessee, and Respondent further charges that Petitioners' reckless disregard of the facts as developed and disclosed by this record is deliberately calculated to confuse, mislead and direct the court's attention away from the matter in controversy. This attempt made by Petitioners is clearly shown by the studied refusal of Petitioners to rely on the facts and the record before this court.

Respondent respectfully states that George Cooper, one of the defendants, was sued only as the representative of the American Federation of Musicians, Local Union No.

257, with offices in Nashville, Tennessee, in the original complaint, he was not sued "individually", also as Petitioners now allege. The record shows that at the hearing on August 5th, 1953, the reason for making George Cooper a party defendant was simply because he was at the time serving as president of the Local Union No. 257 of the American Federation of Musicians, which Respondent alleged was a part of the American Federation of Musicians.

At pages 5 and 6 of the Transcript of the hearing of August 5th, 1953 (referred to as Folio No. 1 in the Response), it appears:

> "The Court: Now, you have sued the Local Union of the Musicians, have you?
>
> Mr. Lester: Yes, sir.
>
> The Court: How do you propose to get process served on the American Federation of Musicians?
>
> Mr. Lester: Well, this local chapter here, or local Union, whatever they call it, is a part of The American Federation of Musicians, and I am just assuming that the rules of the Federal Court and our State statutes would give us the right to——
>
> The Court: (Interposing) Are they doing business in this State?
>
> Mr. Lester: Yes, sir, I think that they certainly are doing business in this State. And, of course, the fact that they have a local union here is proof that they are doing business here. And that is the test. They have their offices here; they have their membership here; they have an elected official here. They are American Federation of Musicians and for that reason they have been included in this lawsuit.
>
> The Court: Now, what relief are you asking against the local union?
>
> Mr. Lester: Well, I'm just including them with the American Federation of Musicians because they are a part of it" (Folio No. 1—pages 5 and 6).

It is evident that Petitioners by their own action have prolonged the temporary injunction by filing Notice of Appeal in the United States District Court, on September 2nd, 1953, only six days after having filed a Notice of Motion to Dissolve or Vacate the Temporary Injunction and before any action could be taken by the Court on the first motion of Petitioners. Any criticism of that which Petitioners alleged to be unwarranted and unreasonable delay of this matter is attributable solely to the action of Petitioners and should not be considered a dereliction on the part of the lower court.

## CONCLUSION.

Respondent respectfully submits that the Petitioners' Reply Brief adds nothing to the record in this cause and that the Writ of Certiorari sought and prayed for by Petitioners should not be granted. The learned Opinion of June 20th, 1954, of the United States Circuit Court of Appeals for the Sixth Circuit should be adopted by this Honorable Court as the guide to be followed in acting upon the petition and deny its prayer for a Writ of Certiorari.

Respectfully submitted,

JONATHON J. FOLEY, JR.,
Attorney for Respondent, Abe Stein.

HARRY S. LESTER,
Of Counsel for Respondent.

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IN THE

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*Petitioners,*

*against*

ABE STEIN, a resident of Davidson County, Tennessee,

*Respondent.*

## PETITIONERS' SURREBUTTAL

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*Petitioners,*

*against*

ABE STEIN, a Resident of Davidson County, Tennessee,
*Respondent.*

## PETITIONERS' SURREBUTTAL

We would not burden the Court with this additional memorandum except for respondent's persistence in endeavoring to mislead the Court.

1. Respondent in its rebuttal memorandum (p. 2) claims that the District Court failed to hear petitioners' motion to vacate the temporary injunction because, no district judge being available to hear the motion, a notice of appeal was filed, just prior to the expiration of time to appeal. The simple answer to this argument is that the petition for certiorari is based on the Court of Appeals' failure to decide jurisdictional questions. The only bearing of the District Court's lack of action on the motion to vacate is to demonstrate, if demonstration were necessary, that the temporary injunction was not, in fact, issued pending a further hearing on the jurisdictional questions.

In any case, respondent's argument that the motion to vacate was not heard because petitioners filed their notice of appeal is clearly wrong. When petitioners wrote to the District Judge months later, inquiring as to when the motion to vacate would be heard (Record, p. 20), he did not suggest any lack of power to hear the motion; he merely replied that he was too busy to hear it (Record, p. 21).* And under Rule 62(c) of the Federal Rules of Civil Procedure, the District Court had power to vacate or suspend the injunction, at least pending the appeal.

2. Respondent asserts (Resp., p. 3) that defendant Cooper was not sued individually but only as representative of Local 257. In support of his claim he quotes from an alleged colloquy which was not in the printed record before the Court of Appeals and is not part of the certified transcript here. Aside from the fact that this alleged material fails to state what respondent claims it shows, the only statement in the complaint relating to defendant Cooper states "That the defendant, George Cooper, is a citizen of the State of Tennessee" (Record, p. 36). We submit that the body of the complaint names Cooper only as an individual defendant.** Moreover, diversity of citizenship is absent whether Cooper is sued individually or in a representative capacity.

Respectfully submitted,

MURRAY GARTNER,
*Attorney for Petitioners.*

EMANUEL L. GORDON,
JORDAN STOKES, III,
*Of Counsel.*

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* Clearly, a lack of power, even had it existed, would not be ground for failing to call a motion on the calendar to be heard, particularly when no answering affidavit or papers in opposition had been filed. Respondent's argument is merely a flight of imagination.

** We note that respondent makes no claim that he is not suing defendant Petrillo individually, although the caption names him only in a representative capacity.